TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 25.

THE STEAMTUG "JOHN G. STEVENS," HER ENGINES, &c., EDWARD H. LOUD, ET AL., OWNERS, &c., APPELLANTS,

vs.

FREDERICK H. GLADWISH ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED SEPTEMBER 27, 1894.

(15,693.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 175.

THE STEAMTUG "JOHN G. STEVENS," HER ENGINES, &c., EDWARD H. LOUD, ET AL., OWNERS, &c., APPELLANTS,

vs.

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INDEX.

	Original.	Print.
Certificate of the judges	1	1
Statement of facts	2	1
Question of law	3	2
Clerk's certificate	4	2

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1896.

1 United States Circuit Court of Appeals for the Second Circuit.

FREDERICK H. GLADWISH, WILLIAM C. MOQUIN, and CARSTEN OFFERMAN, Libellants and Appellees,
vs.
THE STEAMTUG "JOHN G. STEVENS," HER ENGINES, ETC.; EDWARD H. Loud, Oscar F. Chapman, Benjamin Flint, Robert S. Emery, H. L. Preble, John McDonald, William E. Douglass, Augustus M. Morse, Thomas Dunn, George Elliott, O. M. Vinal, Abijah Vinal, Frank H. Patrick, Charles R. Rogers, Owners of the Schooner "C. R. Flint," and as Carriers of the Cargo Laden on Board Thereof, and Andrew J. Brown, Master of said Schooner, Intervenors and Appellants.

A decree adjudging that the libellants and appellees, Gladwish *et al.*, recover against the said steamtug "John G. Stevens" the amount reported due to them by the commissioner, with interest and costs, amounting in all to two hundred and eighteen dollars and seven cents ($218.07), and further adjudging that the lien of the appellees is a superior lien and entitled to priority over the lien of the appellants, Edward H. Loud *et al.*, and that the balance of the proceeds of the sale of said steamtug be paid out of the registry to said appellees, having been made in the district court of the United States for the eastern district of New York, and an appeal having been taken therefrom to this court by the above-named Edward H. Loud *et al.*, and the cause having come on for final hearing, a

2 certain question of law arose, concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose are as follows:

1. That the home port of the tug is New York.

2. That between December 7th, 1885, and March 9th, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York, chap. 482 of Laws of 1862, thereby creating statutory liens on her.

3. That on March 8th, 1886, the tug "J. G. Stevens" was employed in the port of New York to tow the schooner "C. R. Flint" through the waters of said port, and while towing negligently allowed the "Flint" to collide with the bark "Doris Eckhoff" in tow of the tug "R. S. Carter."

4. On March 16th, 1886, Loud *et al.*, owners of the "Flint," libelled the "Stevens" and the "Carter," in admiralty, in the district court of the United States for the eastern district of New York, for the collision damage.

5. On March 16th, 1886, Gladwish *et al.* libelled the "Stevens," in the same court, to enforce their supply lien under the State law.

6. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000.

7. The Gladwish libel resulted in a decree condemning the "Stevens" for the coal supplied and costs, in all $218.07.

3 8. The district court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the "Stevens," leaving the Loud decree unsatisfied.

Upon these facts this court desires instruction upon the question of law for the proper decision of said cause, namely:

Is the lien for the damages occasioned by negligent towage, which arose on March 8th, 1886, to be preferred to the previous State lien for supplies, the libel for supplies being filed last?

And to that end this court hereby certifies such question to the Supreme Court.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN,
Judges of the U. S. Circuit Court of Appeals for the Second Circuit.

4 UNITED STATES OF AMERICA, *Second Circuit,* } ss:

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled Frederick H. Gladwish, William C. Moquin, and Carsten Offerman, libellants and appellees, *vs.* The Steamtug "John G. Stevens," her engines, etc.; Edward H. Loud, Oscar F. Chapman, Benjamin Flint, Robert S. Emery, H. L. Preble, John McDonald, William E. Douglass, Augustus M. Morse, Thomas Dunn, George Elliott, O. M. Vinal, Abijah Vinal, Frank H. Patrick, Charles R. Rogers, owners of the schooner "C. R. Flint," and as carriers of the cargo laden on board thereof, and Andrew J. Brown, master of said schooner, intervenors and appellants, was duly filed and entered of record in my office by order of said court on the fourth day of June, 1894, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 20th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JOHN A. SHIELDS,
Clerk United States Circuit Court of Appeals for the Second Circuit.

5 [Endorsed:] U. S. circuit court of appeals, second circuit. Frederick H. Gladwish *et al.*, lib'l'ts & appellees, *vs.* The Steamtug "John G. Stevens," her engines, etc.; Edward H. Loud *et al.*, intervenors & appellants. Certificate for instructions. United States circuit court of appeals, second circuit. Filed Jun- 4, 1894. John A. Shields, clerk.

Endorsed on cover: Case No. 15,693. U. S. circuit court of appeals, second circuit. Term No., 175. The Steamtug "John G. Stevens," her engines, &c.; Edward H. Loud *et al.*, owners, &c., appellants, *vs.* Frederick H. Gladwish *et al.* Filed September 27, 1894. (Certificate.)

No. 175. 25.

Brief of Putnam for Appts.

Filed Jan. 15, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896

Office Supreme Court, U. S.
FILED.
JAN 15 1897
JAMES H. MCKENNEY,
CLERK.
No. 175.

THE STEAMTUG "JOHN G. STEVENS," HER engines, etc., Edward H. Loud and others, owners of the "C. R. Flint," intervenors and appellants.

against

FREDERICK H. GLADWISH AND OTHERS, libellants and appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS

HARRINGTON PUTNAM
Advocate

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

The steamtug JOHN G. STEVENS,
EDWARD H. LOUD and others, owners of the schooner C. R. FLINT,
Appellants,
AGAINST
FREDERICK H. GLADWISH *et al.*,
Appellees.
No. 175.

BRIEF FOR THE APPELLANTS.

This is heard upon a certificate from the Circuit Court of Appeals from the Second Circuit, desiring the instruction of this court upon a question of the priority of maritime liens.

The schooner *C. R. Flint*, while in tow of the steamtug boat *John G. Stevens*, collided with another vessel through the negligence and fault of the tug. The tug boat was duly proceeded against *in rem* and condemned. A libel *in rem* also proceeded to a decree against the tug boat to enforce a lien for coal that had been supplied to the tug under the law of the State of New York.

The court asks:

Is the lien for damages occasioned by negligent towage, which arose on March 8th, 1886, to be preferred to the previous State lien for supplies, the libel for supplies being filed last?

This case in which this question arises was decided by the District Judge for the Eastern District of New York in favor of the supply lien.

The *John G. Stevens*, 58 F. R., 792.

The argument in this court will be (I) on the general question of priority between maritime liens for reparation of

damage and those as security for debt, in which it will be shown that in the Anglo-American maritime law damage liens outrank the others. (II) The lien against the tug boat for negligent collision in favor of a vessel towed is also *ex delicto*. (III) The considerations of public policy which require that these liens for reparation of wrongs shall be on the whole damaging vessel, and not on the encumbered personal interest of the owner. (IV) The effect of the law of limited liability of vessel owners on the question of full reparation for maritime torts. (V) The continental laws relating to the lien for collision.

I.

THE MARITIME LIEN FOR REPARATION OF DAMAGE OVERREACHES PRIOR CONTRACT DEBTS IN THE ADMIRALTY, AND THE RIGHT OF THE SUITOR IN A CAUSE OF TORT IS PARAMOUNT TO THE LIEN OF A CONTRACT CREDITOR OF THE OWNER.

In 1839 this question was considered by Doctor Lushington in case of a collision, where the contest was between the owners of the injured vessel and one who had guaranteed the payment of repairs and was treated as a holder of a bottomry bond.

After stating the principle of the English procedure *in rem*, Dr. Lushington said:

"Now, leaving out of the investigation mariners' wages and prior salvage, to which a different consideration applies, here are, I think, only two descriptions of claim which it is necessary for me to examine in the present instance, namely, mortgage and bonds of bottomry. In both of these cases I apprehend that the mortgagee and the bondholder cannot take any right greater than the owner could confer, namely, a lien on the ship as security against the owner and all who claim under him. I am also of the opinion that neither the mortgagee or bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might and often does extend to the whole value of the ship; if, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where (as in this case) the damage is done by a

foreigner, and the only redress is by proceeding against the ship. Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration that he has no option or no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks and advance his money or not, as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none."

The *Aline*, 1 W. Robinson, 111, 118.

While much of the above opinion was not essential to the decision, it has been cited and always followed as an authority in the British Admiralty courts.

The question reserved in the above opinion as to the priority between damage claims and liens for seamen's wages has been decided by Doctor Lushington against the wages claims, which were postponed to liens for damage.

The *Benares*, 7 Notes of Cases, 50.
The *Chimæra*, reported in Shipping and Mercantile Gazette, 27 Novr. 1852, and cited in the *Elin*, 8 P. D., 43.
The *Linda Flor*, Swabey 309; also 6 W. Rob., 197 (1857).

The same rule was followed in the Admiralty Courts of Ireland, in 1861.

The *Duna*, 1 Aspinall Mar. Cas., 159.

It is finally settled in England.

The *Elin*, 8 P. D., 39; affirmed ditto, p. 129.

In deciding this point on appeal, Lord Justice COTTON said:

"The principle that the owner who has caused the damage shall not be at liberty to withdraw any part of the fund arising from the value of the ship and freight out of the reach of the claimant for damage is, I think, a just one. I can see no reason, therefore, why we should reverse the existing rule, which has been formulated by these several decisions." (8 P. D., 131).

The present order of liens in England is stated as follows, by a text writer of high authority:

"The liens for damage, as by collision, attach at the instant of collision, and rank against ship and freight adversely to the

owner or mortgagee, or any beneficial charge for value which might exist at the time of the collision, including a bottomry bond, and also before prior wages, prior pilotage, towage and salvage." Foard, Law of Merchant Shipping, p. 217 (London, 1880).

"And the damage lien takes precedence of charges upon the ship arising out of a contract, such as mortgages and bottomry bonds, whether prior or subsequent to the collision in date, liens for wages whether earned before or after the collision, liens for pilotage, and (probably) the possessory lien of a shipwright for repairs."

Marsden, Collisions at Sea, p. 82, (3rd ed., London, 1891.)

See also Abbott on Shipping, (12th English ed.), p. 597.

Maclachlan distinguishes liens in the nature of reparation from beneficial liens. Speaking of the former he says:

"Such liens rank against ship and freight in derogation of any rights of ownership or rights by mortgage, or beneficial lien, existing at the time of the collision. They acquire thereby priority over mortgages, prior bottomry, wages, pilotage, towage and salvage, and subsist adversely to proprietary interests and claims."

Law of Merchant Shipping, pp. 741, 742 (4th ed., 1892).

In the United States the law was early declared by this Court to be that the entire damaging vessel is devoted to making complete restitution to the injured party, and for this purpose of reparation the delinquent vessel is even personified as itself the offender.

In the United States *v.* the brig *Malek Adhel*, 2 Howard, 233 (1844), Judge Story, delivering the judgment of the Court, said:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The ship is also, by the general maritime law, held responsible for the

torts and misconduct of the master and crew therof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere, within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

The cases in which the courts have considered the responsibility of the vessel for collision show that it is the *thing* which is impressed with the lien, by reason of it causing the damage, independent of the will or volition of the owner, or of the relation of master and servant between the owner and the crew. In the case of The *China*, 7 Wall., 68, Mr. Justice Swayne said:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors.

"But while the law limited the creditor to this part of the owner's property, *it gave him a lien or privilege against it in preference to other creditors* * * * the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come, it is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

In the case of the *Siren*, 7 Wall., 152, the steamship *Siren* had been captured by the steamship *Gladiolus* while attempting to break the blockade at Charleston, S. C., and was placed in the charge of a prize crew and ordered to Boston. She put into the port of New York for coal, and on her voyage through Hell Gate sank the schooner *Harper*. She was condemned as prize by the U. S. District Court of Massachusetts. The owners of the *Harper* intervened by petition, but the District Court rejected their claim. It was contended that the vessel, being in charge of a prize crew, the doctrine of master and servant did not control, since the Government is never held to respond for the acts of its servants.

The Supreme Court reversed the decree of the District Court, and held the *Siren* liable for the collision.

Mr. Justice Field, said (p. 155):

"For the damages occasioned by the collision of vessels at sea, a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case, the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel."

It is a necessary consequence of this rule of liability *in rem*, that the entire value of the damaging vessel becomes a pledge to the injured party for restitution. Hence, no part of this security can be withdrawn through prior contracts of the ship owner. Such liens must be postponed to the rights of the damage sufferer.

Accordingly, Mr. Justice Bradley treated the principle of the superiority of damage liens as axiomatic, saying:

"Liens for reparation of wrong done *are superior* to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other, if they arise from the same cause. We think, therefore, that the lien of the libellants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer for the same cause."

Norwich Co. *v.* Wright, 13 Wall, 104, 122.

By this decision it was determined that, although the owner of the steamer *City of Norwich* was at fault for the collision with the schooner *Electra*, and could limit its liability, only the liens for collision could come into concourse, that is, the claims of the schooner and cargo, and the cargo of the steamer herself; but that liens growing out of the debts of the petitioning owner were inferior in rank.

It is believed that no subsequent authority in this court has ever modified this salutary rule, which for twenty-five years has been followed in proceedings for limitation of liability of ship owners.

In the First Circuit the decisions of Doctor Lushington

postponing the liens for wages to the rights of suitors for collision were followed by Judge Lowell in 1870.

The *Enterprise*, 1 Lowell, 455.
Veazie v. The *Frank Herbert*, Mss. Opinion—see Appendix.

The doctrine of the entire liability of the damaging vessel has also been fully accepted in the First Circuit. In 1881, Judge Lowell said:

"If a ship, in command of a pilot, whom it was compelled to take, injures another ship through the fault of the pilot, the ship is liable unless exonerated by statute. If charterers are owners for the voyage, and appoint the master and crew, the ship is still liable. If she were navigated by pirates who had run away with her, she would, in my opinion, be responsible to the injured ship."

The *Arturo*, 6 F. R., 308, 313.

In the Second Circuit, after some divergence of views between the learned Judges of the District Courts of New York, precedence has finally been given to a tort over an earlier contract lien.

In the *Boston*, Blatchford & Howland Rep., p. 309, Judge Betts, in 1832, gave a decree to freighters for their lien for damage to cargo, and directed that the proceeds in the registry, after satisfaction of this lien, should be retained to meet an earlier claim by material men, whose libel was on a bottomry bond, where the bond itself had been held invalid.

In 1853, Judge Hall, in the Northern District of New York, decided that the lien of the injured vessel in collision was of equal grade with contract liens, and preferred it because later in time, under the rule of inverse order of creation.

The *America*, 16 L. Reporter, 264; 1 Federal Cases, No. 288.

Judge Betts, in the Southern District of New York in 1857, gave priority to the lien of the shipper of goods for loss of cargo, over a claim for labor and articles furnished in the home port, though the latter were secured by mortgage.

Justi Pon *v.* the *Arbustci*, 14 Fed. Cas., p. 62.

In the *Pride of the Ocean*, 3 F. R., 162 (1880), Judge Ben-

edict, in the Eastern District of New York, gave priority to the lien for collision over earlier bottomry. In the *Samuel J. Christian*, 16 F. R., 796 (1883), he gave priority to the subsisting supply and material liens over a claim for damages from negligent towage.

In the *Frank G. Fowler*, 17 F. R., 656, where both competing claims were in tort, Mr. Justice Blatchford, at Circuit, reversing Judge Choate, gave priority to the earlier in point of time, thus overruling the doctrine of payment of maritime liens in the inverse order of their creation.

Judge Addison Brown, in the Southern District of New York, gave priority to earlier contract claims, holding that damage claims were to be postponed, in analogy to the code provisions for the ranking of privileges on vessels, in continental countries.

The *Young America*, 30 F. R., 789.
The *Amos D. Carver*, 35 F. R., 665.

The collision in the case at bar gave rise to a damage lien not only against the *John G. Stevens*, which was towing the schooner *C. R. Flint*, but also against the tug *R. S. Carter* which was towing the other colliding vessel. The lien of the libellants against the *Carter* was therefore a pure tort. Judge Benedict gave these libellants as damage sufferers preference over the earlier supply claims.

The *R. S. Carter*, 38 F. R., 515.

Upon appeal to Mr. Justice Blatchford, at Circuit, he referred to the above divergencies of decision and said:

"This difference of opinion between the judges of two of the District Courts in this circuit on the same question makes it important for this Court to establish a rule which shall be one of uniformity in the District Courts of this circuit upon the question." (40 F. R., 333.)

After exhaustive citation of the authorities this disagreement was settled for the Second Circuit by Mr. Justice Blatchford in 1889, who held that the collision lien outranked those for supplies furnished prior to the collision.

The *John G. Stevens*, 40 F. R., 331; 42 F. R., 413.

In the Third Circuit the question has always been decided in favor of the damage lien, even against a claim for wages.

In the *Maria & Elizabeth*, the District Judge for New Jersey decided in 1882 the question of the right of libellants in decrees for wages to compete with the lien for negligent collision in proceedings for limitations of liability. Judge Nixon said:

"The *pro rata* distribution of the fund, when the amount is not sufficient to pay all claimants in full, provided for by section 4284 of the Revised Statutes, relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade and quality upon the wrong-doing vessel. A decree for damages in a cause of collision overrides all prior liens. There has been a struggle to except the wages of seamen, which are always looked upon with favor in the admiralty Courts, but it has not been successful.

"In the *Linda Flor*, Swabey, Adm. 309, Dr. Lushington held that the claim of a party having obtained a decree in a cause of damage is prior to that of a seaman for wages, assigning as a reason that the seamen are not shut up to their libel *in rem*, but may also maintain an action *in personam*, which cannot be done by one suffering damage from a foreign vessel. He was followed by Judge Lowell in the case of *The Enterprise*, 1 Low. 455, partly because the vessel complained against was a British vessel, and hence subject to the English law, which postpones the lien of the seamen's wages to that of a libellant in a cause of damage, and partly upon the ground that seamen have other available remedies for their wages, and because mariners of the wrong-doing ship may be supposed to share in the fault of the vessel.

"And the law is thus stated by the Supreme Court in *Norwich Co.* v. *Wright*, 13 Wall., 122, where Mr. Justice Bradley, speaking for the whole Court, says: 'Liens for reparation for wrong done are superior to any prior liens for money borrowed, *wages*, pilotage,' etc." 12 Fed. Rep. 630, 631.

He also gave the like preference to a damage towing claim over a lien for supplies.

The *M. Vandercook*, 24 F. R., 472.

In the *E. A. Barnard*, 2 F. R., 712, the Judge of the Eastern District of Pennsylvania, held in 1880, as between contract liens, that those for supplies created by the State laws, were but *quasi* maritime, and should be postponed to liens under the general maritime law.

In the Fourth Circuit, in 1880, Judge Giles, in the District of Maryland, held that the lien under the contract of affreightment for non-delivery of cargo took precedence of prior liens for supplies, citing The *Rebecca* by Judge Ware, and Justi Pon *v.* the *Arbustci*, by Judge Betts.

Hatton *v.* The *Mellita*, 3 Hughes, 494.

In the Fifth Circuit, it was held in the Circuit Court for the Eastern District of Texas, that liens for damage to goods override state liens for suppplies subsequently furnished.

The *Lillie Laurie*, 50 F. R., 219.

In the Sixth Circuit, damage claims are given the priority.

Rusk *v.* The *Freestone*, 2 Bond, 234.

Judge Swan in the Eastern District of Michigan declared his approval of the law preferring tort liens.

The *Nettie Woodward*, 50 F. R., 224.

This rule has been also accepted as to competing supply claims, but not as to wages, by Judge Severens in the Western District of Michigan.

The *Daisy Day*, 40 F. R., 548.

The question was carefully reviewed by the Circuit Court of Appeals for the Seventh Circuit, with the result that the collision lien was held superior even to prior liens for wages.

The *F. H. Stanwood*, 49 F. R., 577.

From this summary it is confidently asserted that in every Admiralty Court in this country, liens for damage are now accepted as outranking contract liens—except only those for mariners' wages, where the practice is not quite uniform.

II.

THE LIEN FOR NEGLIGENT COLLISION AGAINST THE TUGBOAT IN FAVOR OF A VESSEL TOWED IS A VERITABLE DAMAGE LIEN, AND NOT EX CONTRACTU.

The learned District Judge said:

"The claim of Loud although in a certain sense, a claim *ex delicto*, arises out of the neglect on the part of his employe in the performance of a contract, voluntarily entered into by Loud. Loud selected a careless tug to tow the *Flint* and suffered thereby. It was at his option what tug should be given the opportunity to injure the *Flint*. In the exercise of this option, he selected a careless one, responsible indeed to him for any damage to the *Flint* caused by negligence, but given the opportunity to do damage to the *Flint*, by the voluntary act of Loud. In this respect, the claims of Gladwish, Moquin & Co. and of Loud stand on the same ground. In respect to the time of the inception the claims differ. The claim of Gladwish, Moquin & Co. for coal arose prior to the claim of Loud." (58 F. R., 793.)

It was conceded by the Court that the lien for reparation of actual wrong would prevail over a lien for supplies. The judgment in favor of the coal claim rests entirely on the attempted distinction that this collision in law was either an omission to fulfill contract obligations, or that the voluntary selection of the towing vessel takes it out of the category of damage claims.

It is respectfully submitted that this distinction is unsound.

The precise nature of such a towing liability for collision was considered by Dr. Lushington in 1862. The statute of 24 Vict., ch. 10, sec. 7, conferred admiralty jurisdiction to the courts to entertain "any claim for damage done by any ship." The steamtug *Nightwatch* was libeled *in rem* by the owners of the *Prince* for bringing about a collision between the towed vessel and the bark *Julia*. The owners of the tug protested that the action was for breach of contract and not a cause of damage. Doctor Lushington said:

"I am of opinion that this protest which has been filed on behalf of the owners of the *Nightwatch* cannot be sustained.

I must take it that the *Prince* by the improper navigation of the *Nightwatch* which was turning her, was brought into collision with the *Julia*. *This was damage done by the Nightwatch.*"

1 Lushington Ad. Rep., pp. 542, 543.

In 1863, however, Dr. Lushington held that the word "damage" used in the statute "must be taken according to the well understood meaning of the phrase in the Admiralty Court, namely, damage by collision," and he therefore declined jurisdiction of a claim for negligently towing a vessel aground.

The *Robert Pow*, Br. & Lush., 99.

It has been questioned if this narrow and technical limitation is sound, and the later writers submit that the decision must rest upon some broader principle.

Williams & Bruce, Admiralty practice, p. 73 (ed. 1876).

In 1869 this Court considered the legal relation between the tug and tow where the tug had stopped and backed owing to one of the boats becoming detached from the tow, whereby the tug herself collided with the barge *Citizen*, one of the boats towed. The owners of the barge alleged in their libel *a contract* with the tug for a stipulated price and also the negligence causing the injury.

Mr. Justice Davis said:

"The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep*."

The *Quickstep*, 9 Wall., 655, 670.

In 1870, this Court had also a suit in admiralty by a canal boat in tow against the steamboat *Syracuse*, which had towed the canal boat into collision with an anchored vessel. The contract as embodied in the receipt was "at the risk of her master and owners."

Mr. Justice Davis, delivering the opinion of the Court said :

" It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

12 Wall., 167, 171.

If the duty of the tug to tow in respect to collisions were only a matter of contract, then proof of the contract, with evidence of collision damage, would establish a *prima facie* case against the tug. That contract theory has been learnedly urged upon this Court in a case where the tow was lashed alongside the tug. It was however, unanimously rejected, the Court holding that some *fault* must be proved.

The *L. P. Dayton*, 120 U. S., 337.

In a case of a contract of towage, where the tug carelessly brought the towed vessel into collision with a pier, Mr. Justice Blatchford, then District Judge, said:

" The only point of discussion, therefore, is whether the present case is one of tort. Now, the fact that the steamboat was at the time of the loss engaged in towing the canal boat, under a contract of towage, either express or implied, does not make the negligent and careless navigation of the steamboat in performing such towage any the less a tort toward the canal boat or her cargo, if injured thereby, than it would have been toward a third and stranger vessel which should have been injured thereby. * * * * * This view is sustainable entirely aside from any of the doctrines upon which the cases in regard to pure contracts are placed. In cases of contracts for affreightment and contracts for supplies, the obligation of the delinquent rests wholly upon the contract, and arises wholly out of it. In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage, any more than the obligation of a third vessel meeting the canal boat on her trip,

not to collide with her, arose out of such contract, or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle, applicable in all cases of tort—*sic utere tuo ut non alienum laedas*. Her duty did not result from the consideration paid for the towage. It was imposed by the law, and would have existed even though her services had been gratuitous. * * * (552). The present action, therefore, both on the libel and in fact, is one of tort, founded on negligence, and this court has jurisdiction of it."

The *Brooklyn*, 2 Ben., 547 (1868).

The same Judge in a case where the libel alleged a contract of towage, and that, in towing, the steamboat towed the barge on a sunken pier, the existence of which was well known, said :

"If the steamboat was negligent in her navigation in towing the barge, whether she was towed under a contract of towage or not, she was as much guilty of a tort toward the barge, if the barge was injured through such negligence, as she would have been toward a third and stranger vessel which should have been injured through such negligence. Her duty not to be guilty of such negligence was imposed by the law and existed even though the service of towing was gratuitous."

The *Deer*, 4 Ben., 353 (1870).

To the same effect are

The *Liberty*, *No 4*, 7 Feb. R., 226.
The *Frank G. Fowler*, 8 F. R., 331 ; 17 do., 653.
The *M. G. Cummings*, 18 F. R., 178.

In the *Arturo*, 6 F. R., 308, 312, Judge Lowell, said :

"These cases of tow against tug are in form and fact very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others, which it may meet. There is, therefore, an analogy between the two classes of cases, so close, that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision."

See also Judge Benedict's comments on the *Samuel J. Christian*, 15 F. R., 796, in the *R. S. Carter*, 38 F. R., 516.

The foregoing authorities are clear that while a contract of towage may be set forth by way of inducement, the real

foundation of the demand is the tort and negligence of the vessel towing. It is not questioned in the present case that the libel of Loud proceeds upon the tort, and states the right cause of action against the tugs.

In 1885 the question of priorities between negligent towing and supplies was considered by Judge Nixon in the District Court of New Jersey. He states the question to be:

"Did these damages arise *ex contractu* or *ex delicto?*" After a review of the cases, he concludes:

"The claims, then, being *ex delicto* and not *ex contractu*, they have a higher rank, and should be paid before the claims for repairs and supplies."

The *M. Vandercook*, 24 F. R., 473, 478.

In 1887 Judge Addison Brown, in the Southern District of New York, postponed the claim of negligent towage as arising from a *quasi* tort, upon arguments, however, that apply with nearly equal force to pure torts.

The *Young America*, 30 F. R., 789.

As repeated decisions have thus established that the liability of the tug is really in tort (unless as in the case of *The Samuel J. Christian*, the tort is waived and only the contract set up) this distinction against the priority of towing liens for collision, if maintainable at all, must stand on the single ground of the previous *voluntary* relation of the parties. But this is even more true of cargo and its lien on the carrying vessel.

It might be urged that the lien for cargo damage was voluntary and arose from the fact that the shipper had himself selected a negligent ship master to carry his goods, and therefore should be postponed to a liability without such a voluntary relation.

This Court in the *City of Norwich* has expressly decided that the lien of cargo on the delinquent carrying steamer was entitled to equal rank with the lien of cargo on the libelling schooner, and in doing so expressly held that contract liens were postponed. Instead, therefore, of this ruling of Mr. Justice Bradley being a *dictum*, as is sometimes urged, it was

essential to the decision, and is decisive against any such postponement of *quasi* torts.

This reasoning was very clearly stated by the District Judge for the Western District of Michigan in 1889. After reference to the decision of this Court in Norwich Co. *v.* Wright, Judge Severens said :

"But it cannot be doubted that the Supreme Court did adjudge in that case, that the claim for the loss of the cargo laden upon the offending vessel under a contract of affreightment was entitled to the same rank, and to share equally with the claims for the injury to the wronged vessel and its cargo. It was necessary for the Court to decide that question, because the damages of the libellants did not extend to the amount at which the liability of the ship-owner was limited by the Act of Congress ; and unless the value of the cargo upon the libeled vessel would share with the claim of the libellants (which was for the value of the lost vessel and its cargo) no further question was in the case. But the Court, having held as above stated, proceeded to adjudge the other questions upon that footing. And it seems to me that that adjudication destroys the validity of the reasoning pursued in the New York cases above cited. Their argument is that, conceding the damages resulting from collision are entitled to priority over claims for supplies and the like arising *ex contractu*, still the damages resulting from fault in towage arise substantially from a breach of contract, and are suffered by one who has voluntarily come into contract relations with the towing vessel, as distinguished from one who has exercised no freedom of action, as in a case of collision. And the inference drawn is that the damages, being thus essentially for breach of contract, must rank with ordinary claims arising upon contract, and fall under those arising out of tort, as in collision. But every incident thus assumed as the basis for the difference of rank in claims for collision and negligent towage exists in the case of claims for damages to the cargo on board the offending ship in collision. Surely, there would be no solid ground for distinguishing in this particular between claims arising out of a contract of affreightment and those arising out of a contract for towage. Besides, the question whether a claim is one in contract or for tort is by no means a sure test of priority, as the course pursued in one of those cases of giving priority for seamen's wages shows. But, aside from all that, the reasoning adopted by those Courts to show that a claim arising from negligent towage is in its nature and analogies *ex contractu* is not, I must say, with great deference, satisfactory to me, and it seems that the view taken by Judge Nixon in *The M. Vandercook* is the correct one, (and see, also, *The Liberty No. 4*, 7

Fed. Rep., 226 ;) for, although the parties are in contract relations, they contemplate the opposite of negligence. By the contract the towing vessel undertakes the duty of vigilance and skill. It is quite similar in its general features to that implied in the contract for carriage, though it may not be in all respects the same. Is the duty which binds to skill and watchfulness any the less because the contract relation exists? The law imputes the duty in either case, whether to a vessel proceeding on her course among strangers, or to one who has by stipulation undertaken an obligation wherein the law implies that duty as specifically and distinctly due to one. An action in tort would lie for a violation of that duty, (*The Quickstep*, 9 Wall., 665,670,) and I know of no rule of law or anything in reason which should lead to any distinction in the character of the duty or in the merits of the claim for damages in the two cases."

The Daisy Day, 40 F. R., 540.

In the *F. H. Stanwood*, 49 F. R., 577, the Circuit Court of Appeals for the Seventh Circuit, in 1892, reviewed the authorities on damage and contract liens. Judge Jenkins said (p. 581) of the New York decisions, based on the distinction out of a voluntary relation of tug and tow :

"It may be doubted whether in the light of the cases of the *Quickstep*, 9 Wall., 665, and Norwich Co. *v.* Wright, 13 Wall., 104, the distinction can be upheld."

It is manifest that if a shipmaster at sea hails a tugboat, and the tug injures the vessel by negligence *before* she has received the towing hawser, there is no difference in the character of the wrong done, and there should be none in the remedy afforded, between this prior collision and a like injury *after* the towing had been completed.

The so-called voluntary relations between the tug and tow are entirely different from the coal debt of the tug.

The coal Company was a voluntary creditor of the tug owner both in giving the coal and because it had the option of allowing the tug owner a delay, taking in the meantime a statutory lien, a *jus in re*. On every voyage, after delivery of the coal, this quasi-proprietary right was in effect renewed, and the credit extended by the Coal Co., which elected to wait on the tug's future earnings. The option and indulgence were both before and after the full liability as contemplated, had been voluntarily accepted.

Taking the tug *Stevens* to tow the schooner was not the voluntary choice of a *negligent* tug. At this initial stage of the voluntary relations, there was no negligence. The tug was bound to tow with care. Tug and schooner merely agreed on a mode of navigation, in which the tug furnished the traction power. Out of all the tugs in port, the *Stevens* was the one that had undertaken this towage. So, out of all the steamers on Long Island Sound, the *City of Norwich* was selected to transport cargo. Likewise in every case of injury to passengers, it may be said that the passenger had entered into a voluntary relation with the carrier.

When this collision did come, the liability of the tug to the schooner damaged was hardly more a matter of agreement than the collision of two independent steamers which had previously agreed on a mode of navigation through assenting whistles. The duty of reparation comes as a natural right in all these cases of maritime tort, and the resulting lien is not impaired by the fact of such pre-existing contract relations.

When the right of reparation arose, libellants enforced their lien by a prompt judicial arrest of the tug.

The libel of Loud was also on behalf of the cargo laden on the *C. R. Flint.** Could it be seriously claimed that this lien for *cargo* damage against the *J. G. Stevens* was postponed to the tug's unpaid coal bills?

Did the *shipper* of cargo on the *C. R. Flint* in any legal sense choose the *J. G. Stevens*, and thereby voluntarily release his claims to priority?

It is submitted that the true rule is that whether the suit be cargo against ship, or tow against tug, the *gravamen* is the wrongful destruction or damage to property with its consequent lien against the offending *res*, and the prior voluntary relation of the parties is immaterial in the ranking of these liens.

*The damages to the schooner in the decree without interest were $4,665, while the cargo loss adjudged was $8,205.26. 41 F. R., 156.

III.

IT IS AGAINST PUBLIC POLICY TO ALLOW THE SHIP-OWNER TO ENCUMBER HIS VESSEL WITH CONTRACT LIENS THAT HAVE A CONTINUING PRIORITY, SO AS TO DIMINISH AND DESTROY THE REMEDY FOR COLLISIONS AT SEA.

The preservation of life and property at sea require that the remedy for collision shall be sedulously preserved, and the full value of the delinquent *res* appropriated to the satisfaction of collision damages. This is the foundation of admiralty proceedings *in rem*. If a tugboat owner can, through a State statute, reserve any part of his vessel for the payment of his coal bills, there is an obvious advantage in running harbor tugs plastered over with supply liens, which would constitute an effectual destruction of a tort liability, reducing what would be left of the *res* to the vanishing point.

In the case of coal supplied to a steamtug, there is no actual betterment of the *res*. The tug simply gets fuel to keep her going.

If the question be looked at in a wider view, it is difficult to see any reason why the prior bottomry creditor should escape the consequences of a subsequent collision, which is one of the hazards of navigation, for which he charges and receives his maritime premium. Other supply claims that are not in the class of bottomry, are usually doubly secured, having along with the lien a remedy *in personam*, which certainly postpones them to collision creditors who can only look to the offending *res*.

The suggestion that the interests of commerce require credits to be given and the security of liens to aid vessels in strange ports has two answers.

(1.) These liens are recognized. But by the very fact of such a lien the lienor becomes thereby interested in the vessel, and her subsequent navigation is partly at the lienor's risk—a risk not only of total loss, but of total absorption by newer liens either in contract or tort.

It is an anomaly to give a creditor a maritime lien that shall be independent of future liabilities of the vessel even for twenty-four hours. But if such a continuing priority of lien

could ever be granted, it should be on different grounds from those invoked by a supply man in the home port.

(2.) Such a change has been worked in the commerce of the world by the facility of cable and telegraph conmunication, that at the present time hardly any port is beyond the reach of the ship-owner, and the resources of his personal credit.

For this reason, among others, the maritime commerce of England has no lien for necessaries, and it is not perceived that it lacks those "wings" which ship credits in the home port are thought to supply.

If the ancient law of liens is to be changed—if the former rule of priorities is to be overturned—then the increase of sea casualties and greater frequency of collisions should give to the collision creditor, if any lienor, the privilege of a continuing priority independent of subsequent casualties.

IV.

THE STATUTE LIMITING THE LIABILITY OF VESSEL OWNERS GIVES DAMAGE LIENS A PRIORITY OVER EARLIER SUPPLY CLAIMS.

The tow has two remedies against the tug. It can proceed *in rem*, as in the case at bar, or personally against the owners of the tugboat. If the latter, the owners of the tugboat could reduce and limit their liability to the value of their interest in the boat. In such a case could the unpaid coal claims incurred prior to the collision voyage come in to absorb the amount of the owner's liability? Clearly not.

The *Leonard Richards*, 41 F. R., 818, 820.
Gokey *v.* Fort, 44 F. R., 364.
The *U. S. Grant*, 45 F. R., 643.
Benedict's Admiralty (3d ed.), p. 334.

The admiralty law has shut off the claimant of damages from any fund save the value of the wrongdoing vessel on the voyage where the collision occurs. On this voyage the liabilities are distinct from any previous voyages. No lien created by the Legislature of New York can be permitted to

break over this established rule of the general maritime law.

This being in accordance with justice, it follows that what the coal merchant could not do in concourse with all the claims on a voyage, he cannot do after the vessel has been already arrested under the collision process of the damage claimant alone. The very fact that presumably he has another remedy against the resident owners effectually prevents the domestic supply man from either taking a dividend in limitation proceedings, or from absorbing any part of the damaging *res* by a subsequent libel.

Liens for supplies obtained in the home port stand on a different footing from those furnished abroad. The law presumes the presence of the shipowner at the home port, and his personal obligation for payment. If a State statute confer a lien in addition, the lienor for coal has a double remedy—to sue the owner, or to pursue the *res*.

> The *Belfast*, 7 Wall., 624, 643.

As holder of these two remedies, he cannot absorb the proceeds of the vessel, to the prejudice of the damage lien, which runs only against the *res obligata*.

> Coote, Admiralty, 122, 123.
> The *Sailor Prince*, 1 Ben., 461.

A modern writer has remarked that a sea-going ship is an engine often of great power and capable of doing great damage to person and property outside itself. That therefore in the interests of public security, the ship herself makes her owner liable to the extent of her value and the freight; and that even if the law of the home port should discharge the owner from all liability for reparation, still the law of the forum enforcing the liability of ship and freight can be rightly applied to insure the safety of the public and the equality of all before the law.

> Bar, Private International Law, Guthrie's translation, p. 716 (2d ed.).

So long as the value of the offending *res* with its pending earnings is distributed to pay for injuries done, all vessels stand equal before the law. Take from one value the unpaid coal and supply bills and leave only the residue as a compensatory

fund, and there is no longer equal justice. If two steamtugs of like value are towing the same vessel, and both concur in producing the same injury to the tow, why should the damage claimant get the full value of one offending tug and not the other?

The door that would thereby be opened to collusion and fraud is manifest.

Such a rule would disregard the safety of the public, and the equality of all before the law, for the sake of favoring delinquent debtors, over solvent cash-paying shipowners.

V.

THE EFFECT OF CONTINENTAL LAWS UPON THE DAMAGE LIEN.

The decisions of the Southern District of New York, postponing the maritime lien for collision, are based largely on the analogy of the continental codes of commerce. If the Admiralty Courts of this country are to derive their rule of priorities from these modern legislations, it must be acknowledged that the deductions by the Honorable Addison Brown, from a most learned and comprehensive survey of the provisions of modern codes, are adverse not merely to the *priority* of a lien for damage, but are against its very existence as a privilege.

But are these codes, enacted since 1808, any authority here? What is considered of far more weight—the older maritime law itself—is only so far operative as law in any country as it is adopted by the legislation and usages of that country.

> The *Lottawanna*, 21 Wall., 558.
> The *Scotland*, 105 U. S., 24, 29.
> Liverpool S. Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 444.

Has any foreign code-ranking of maritime privileges been adopted in the United States, or in any outside country, save by express legislation? When many of these codes were enacted, already the United States had a law of priority, derived, not from any mere municipal and separate code, but

from those older *fontes* of right that had for ages embodied the real maritime law of all the seas.

The argument was made in the Courts below that as the relation of tow to tug is analogous to cargo in a carrying vessel, the lien of the tow for collision should be postponed to the same order as the lien for cargo damage.

In the Ordonnance de la Marine the privileges of cargo claims for damage were put last.

This ranking was sharply critised by Emerigon.

See the *Rebecca*, Ware, 188, 193.

Emerigon said:

"It seems that the lien of those whose merchandise has been lost or diminished by average resulting from any other cause than the peril of the sea *ought to be placed first*, even before the seamen, because such losses or damage generally proceed from their fault. It would be much more just to give shippers the preference to those who have lent money before the departure; because the former are ignorant of the provisions and loans that have been furnished in the place of equipment. But the Ordonnance places them only in the fourth rank, although the second is allotted to them by the Consolato."

Emerigon, Contrats à la Grosse, Hall's Trans., pp. 236, 237.

The passage of the Consulate of the Sea cited by Emerigon, is quoted by him in full. After declaring the master liable for cargo damaged by water, the Consulate continues:

"If the captain be insolvent, the ship is liable; and those who are thus injured are preferred to all other creditors, except the seamen," p. 336.

Sir Travers Twiss's version is:

"And if they do not suffice, the ship ought to be sold without the part owners or the creditors having any preference, saving always the mariners, who are not to lose their wages."

3 Black Book of the Admiralty, p 934.

Engelbrecht, in his German translation of the Consulate, appends this foot note to the passage:

"If he [the master] cannot pay, then the ship must be sold,

and the damage claim shall be a preference before the owners, and those who have lent money to the ship" (und die Schadenersetzung soll ein Vorzug vor den Rhedern, und vor denen haben, die Geld auf das Schiff geliehen). Engelbrecht, Corpus Juris Nautici, p 215 (Lübeck, 1790).

See Targa, Ponderazioni sopra la contrattazione Maritima, p. 198 (Ed. Genoa, 1803).

In the Italian version of the Consulate of the sea, Casaregis (in 1729) gives the following translation (having stated the case of the master unable to pay the damage):

"debbasi vendere la nave, perchè compagno ne prestatore non possono niente avere, (for neither the part owner, nor the lender can take anything) salvo li marinari che non perdono li salarj loro."

In his commentary on the text, Casaregis explains that this damage claim is to be paid, with a preference, ("*e pagarli con prelazione*").

Casaregis, Discursus legales, vol. 3, pp. 114, 115 (ed. Venice, 1790).

The authority of the Consulate is unique. It rests on no edict of a lawgiver. Having developed with minuteness the shipping usages and the customary law of former times, the Consulate of the sea is based on the *consensus gentium.* Grotius recognized in it the laws of the Greek and German Empires, as well as the regulations of later commercial States.

"Liber *consulatus maris* editus est lingua Italica, in quem relatae sunt constitutiones imperatorum Graeciae, Alemaniae, regum Francorum, Hispaniae, Syriae, Cypri, Balearium, Venetorum, Genuensium." De jure belli ac pacis, lib. III., 3 v.

Casaregis declared that by reason of its character as a record of sea customs it had become an acceptable international law for all countries.

"Consulatus maris qui in materiis maritimis debet inviolabiter attendi, uti universalis consuetudo non minus legis vigorem in se habens communiter apud omnes provincias et nationes recepta." Disc. XIX., §3.

Valin (in 1760) said :

" Après les loix romaines, les plus anciennes, comme les plus fameuses, que l'on connoisse sur le fait de la navigation et du commerce maritime, sont celles comprises dans une collection qui a pour titre, *il consolato del mare*, etc. C'est une compilation des anciennes loix maritimes servant à régler la police de la navigation et tout ce qui appartenoit alors au commerce dans les mers du Levant." * * *

" En un mot, ces ordonnances au décisions maritimes furent généralement adoptées par tous les peuples navigateurs."

Préface, Nouveau Commentaire sur l'ordonnance, viii. and x.

Emerigon (in 1780) replying to the criticisms of Hubner, upon the chapter of the Consulate which treats of prize, said :

" This author having found, in chapter 274, certain decisions opposed to his own system, fell into a rage against the whole work ; but had he studied it with any care, he would have been convinced that the decisions contained in the Consulate are founded in the law of nations. Hence they have secured the suffrages of nations. They have supplied ample materials to the compilers of the Ordonnance of 1681, and in spite of the gothic form with which they are sometimes clothed, one cannot but admire the spirit of justice and equity which has dictated them. (*On y admire l'esprit de justice et d'equité qui les a dictées.*)

Préface, Traité des Assurances, Vol. 1, p. VIII.

Capmany, in his Castilian edition of the Consulate, claiming authorship in Barcelona, said :

" Es el primer código escrito de los usos y costumbres con que los principales estados maritimos del levante dirigieron su navigacion y comercio desde los primeros siglos de la baxa edad, y el unico que por el consentimiento de todas la naciones comerciantes lleva el sello de derecho nautiça de las gentes."

Código de las Costumbres maritimas de Barcelona, Madrid, 1791, Discurso V, VI.

Boucher compared the authority of the Consulate, in the maritime law, with that of the Pandects in the Civil Law.

" Parmi les nations maritimes en particulier, le consulat de la mer jouit de la même autorité dont jouissent les Pandectes de Justinien parmi toutes les nations en général ; conséquemment, si les Pandectes sont souvent décisives dans les contesta-

tions civiles, le consulat de la mer n'est pas moins décisif dans les contestations commerciales et maritimes."

Boucher, Préface Consulat de la Mer, Tome I., p. iii., Paris, 1808.

A later writer says:

"Pour tout dire d'un mot, c'est le droit maritime tout entier à l'état d'archétype."

Cresp. Droit Maritime, tome I., p. 14 (Paris 1876).

Mr. Justice Story, writing of the Consulate in 1818, remarks that the question, what country is entitled to the honor of its origin, has been contested with as much zeal as the birthplace of Homer; and that it is the "grand reservoir from which have been drawn the principal ordinances of modern maritime nations." Referring to the praise of Casaregis, Emerigon, Valin, Vinnius and others, he continues:

"But in our judgment it is not necessary to resort to the *testimonia eruditorum*. The fact that the substance of its regulations was eagerly embraced, and immediately incorporated into the usages and the ordinances of all the maritime nations of the continent, pronounces a eulogy on its merits, which no formal vindication can surpass."

Story, Miscellaneous Writings, p. 101 (Boston, 1852).

In delivering the judgment of this court, in 1839, Mr. Justice Story followed the authority of the Consulate—"one of the earliest and most venerable collections of maritime law."

Columbia I. Co. *v.* Ashby, 13 Peters. 341.

Other cases in which the Consulate has been cited and followed by this court, are

Insurance Co. *v.* Dunham, 11 Wall., 34.
The *Scotland*, 105 U. S., 28.
The *Main*, 152 U. S., 126.

As has already been shown under the second point, the Admiralty Courts of this country have adopted the preference of damage claims upon the authority of the Consulate of the Sea and of Emerigon, rather than the postponement of them provided in the French Ordonnance.

The rank of privileges on vessels by the later continental codes cannot be an authority in our courts for the following reasons:

(*a*) The continental practice does not know and cannot administer a veritable maritime lien.

This Court said in 1870:

"Neither the writ of sequestration, nor the process of attachment, is a proceeding *in rem*, as known and practiced in the Admiralty, nor do they bear *any analogy whatever* to such a proceeding, as the suit in all such cases is a suit against the owner of the property, and not against the property *as an offending thing*, as in case where the libel is *in rem* in the Admiralty Court to enforce a maritime lien on the property."

Leon *v.* Galceran, 11 Wall., 185, 189.
See the *Belfast*, 7 Wall., 624, 644.

The modern procedure of the Continent ignores this comprehensive remedy. It requires suits to be against the owner or master, with the attachment of the vessel only as auxiliary to a personal suit. 5 Desjardins, Droit Maritime, §1112.

In France to-day there is no security, lien or privilege for collision. If the ship is judicially sold, the privileged and hypothecation debts of the owner are first paid. The collision creditor, thus outranked by even a mortgagee, comes in merely as one of the owner's general creditors (*créanciérs chirographaires*).

This distinction is fundamental. When mere personal liability becomes the foundation of the suit, the distinctive liability *in rem* is gone. Not only is there no admiralty lien, but no compensatory remedy at all, if the owner is irresponsible and the ship encumbered.

(*b.*) The privileges of these codes are mere rules for marshalling assets and administering funds, in analogy to bankruptcy, and following the practice as to ordinary movables, ignoring the peculiar rights and remedies of maritime commerce.

An example is found in the French code of commerce (Art. 191), where the eighth rank is given to the vendor of the vessel —which privilege is thus made to precede bottomry, and dam-

ages due to the cargo—an incongruity, as to which, a late writer says:

"La disposition de l'art 191.8° relative au vendeur est obscure, *et donne lieu à de grandes difficultés.*"

Lyon Caen, Traité de Droit Maritime, vol. 2, p. 595 (Paris, 1896).

How comes it that a legislator could ever give a superior vendor's privilege on a ship, that should override even the lien for money for the necessities of the voyage, and the vessel's obligations to cargo? Simply because a vendor was given a first lien on immovables (Code Civil, Art. 2103), and the fourth in order on movables (Art. 2102). Because there is no such thing as salvage in the Civil Code, and collisions at sea were not found there, the codifier of the Commercial Code wholly omitted those liens from his statutory priorities.

Not only does the French Code of Commerce (Art. 190) give the vendor a privilege, but extends it to his creditors, prior or subsequent to the sale!

(*c.*) They have the arbitrary and illogical characteristics of all statutes of continental countries ranking liens, which, appertaining exclusively to the *lex fori*, neither themselves rest on maritime analogies, nor furnish sound analogies to other jurisdictions.

According to the decisions of the German Courts before the present commercial code, even the preference of bottomry allowed at Hamburg was not regarded at Celle in Hanover. A decision of the Supreme Court of Appeals at Celle is as follows:

"The writing which forms the foundation of the pursuer's contention cannot give him the right of preference which he claims in relation to the impignorated vessel, *for a claim of bottomry according to our law does not involve any privileged right of security*, and the privileges which are accorded to it by the law of Hamburg cannot regulate the order of preference of real rights in a competition in this country, although the contract which gave rise to the real right may have been under the regulation of the law of Hamburg."

Bar, Private International Law, Guthrie's trans., p. 533n (2d ed. Edinburgh, 1892.)

The French code of commerce, and the codes which are patterned after it, except the recent codes of Denmark, Sweden, and Norway, give privileges to debts anterior to the voyage—even ranking them sometimes above those on the last voyage—a clear departure from the correct views of shipowners' limitation of liability.

(*d.*) To foster certain favored interests, they have departed from the ancient law of the sea, which secured full indemnity to the extent of the value of the offending *res.*

The French owner of vessels sunk by negligent collision, who compares the provisions of the French code with the exact justice given by the Roman and mediæval law, might well say with the old British maxim, "*Misera est servitus, ubi jus est vagum aut incognitum.*"

The Civil code of Lower Canada, based on both the French and English systems, deals in an interesting manner with the lien for collision.

Having declared in Article 2383 the order of privileges on vessels, and in Article 2385 the rank of liens on cargoes, a special exception follows:

ARTICLE 2387. "The order of privileges declared in the foregoing articles is without prejudice to claims for damage by *collision*, or for average contributions, or for salvage, which are paid by privilege after the debts enumerated at 1, 2, in Articles 2383 and 2385, and before or after other privileged debts according to the circumstances under which the claim has arisen, and the usage of trade." (Classes 1, 2 are the costs of seizure, and pilotage and harbor dues and penalties for breach of harbor rules).

ARTICLE 2388. "The provisions contained in this chapter do not apply in cases before the Court of Vice-Admiralty. Cases in that Court are determined according to the civil and maritime laws of England."

Civil Code of Lower Canada, vol. 2, p. 466 (Sharp Ed., Montreal, 1889).

Notwithstanding the judgments of this Court, delivered by Mr. Justice Story and Mr. Justice Bradley, declaring that the offending thing was looked to in the ancient law, doubts have of late been expressed as to the legal basis for this personifica-

tion of the wrong-doing vessel. Because the maritime procedure in the continental countries follows the ordinary practice in civil suits, and since Clerke's Praxis gives no form of writ *in rem* for collision, it has been questioned whether the ancient remedy for maritime torts was as complete as is now given by process *in rem*.

Those compilations of shipping law and custom which show the rise of independent sea courts, furnish evidence of a striking uniformity of usage, which, starting with the western Italian cities, quickly overspread the Mediterranean and passed out into the ports of Northern Europe, extending as far as Gothland and the easternmost towns of the Baltic. All have the same idea. When dealing with collisions, the ship is personified. From the middle of the twelfth, up to the fourteenth century, the ship itself, and not the owner, is declared primarily answerable for the whole or half damages.

In Pisa, a code of customary sea law was published in 1160, that became the maritime authority, first for that city, and afterwards for the commerce of the Florentine States, when Florence had subjugated Pisa, and appropriated its shipping, courts and laws.

This *Constitutum Usus* of Pisa, under Rubric XVI. : "De damno navi dato ab altera navi," enacted :

"Any ship, that culpably damages another ship, is held to make recompense ; as if any ship in calm weather enters a port and does damage to another ship, lying in the harbor, by striking it, it is bound to compensate it." (Alteri navi in portu standi percutiendo damnum fecerit, ei emendare teneatur.)

4 Pardessus, Lois Maritimes, p. 583.

The Consulate of the Sea, a century later, contains similar provisions, regarding collisions of vessels anchored and under way, and declaring the faulty ship bound to make restitution.

Chapters CLV., CLVI., and CLVII.

Thus if bad weather threatens, and a moored vessel neglects to heed the warning to moor more securely, given her by a vessel that has arrived subsequently, and she afterwards does damage by reason of her insufficient moorings :

"*She* is bound to make compensation for all the damages which she may have done to her, by reason of the warning which was announced and declared to them by those on board the ship or vessel which entered the last. But nevertheless, if the ship which first arrived has given out all her cable and has made every effort, whether she be in a place or not where she can find additional tackle, *she* is not responsible for the damage which she may do to the other."

3 Black Book of the Admiralty, p. 285.

Similar liabilities imposed directly on the colliding ships, either for the whole or half damages, appear in the collections of maritime law, that are deemed merely to have declared long-standing usages, observed by consuls, merchants, and judges in sea causes.

Les bons usages, etc., de la Commune d'Oleron (end of 13th. Century) Chap. 69, 2 Black Book of the Admiralty, p. 379.

Laws of Wisbuy (about 1266) Chap. 70.

4 Black Book, p. 284.

2 Peters Ad. Dec. Appendix, XC.

Statutes of Riga (1270) Chap. 157.

3 Pardessus Lois Maritimes, p. 505.

Art. 2 of the Hamburg Seerecht, treating of collisions, provides also for the case where the damaging vessel is insufficient to make good the loss. The whole article is:

"If two ships, at sea, or in port, by day or night, large or small, collide, and the one goes against the other so that it breaks and sinks, then that ship which remains afloat shall repair the full damage to the sunken ship and cargo, unless the master of the ship that stays afloat with her mate and crew, shall swear that it happened accidentally (undankes gescheen is). Then he pays only half the damage. If, however, the damage sustained by the sunken ship and cargo exceeds the value of the ship that stays afloat with its appurtenances at the time of the injury, the patron is not liable further. Also the merchant's goods that are in the colliding ship are not liable for the damage."

3 Pardessus Lois Maritimes, p. 348.

The Customs of Amsterdam, Enchuysen and Stavern, published in 1406, and embodying the sea usages of the commerce

of Holland, provide for this primary liability of ships for collision.

Art. 12.

"A ship sailing from Amsterdam or other port, one has collided with the other involuntarily, each bears half the damage (een ygelijk sal de Schade half gelden ende hebben). But if the collision was by design (met Willen) the one which damaged the other shall solely pay the damage (die Schade alleen gelden)."

1 Pardessus Lois Maritimes, p. 412.

A clear statement of the collision lien is found in the early Scandinavian maritime laws. The Code of Frederic II, promulgated in 1561 for Denmark and Norway (3 Pardessus 225, 241) contained the following rule for collision liability:

ARTICLE 56.—If a ship lie in the roads or in port, and another come in under sail and run down the ship at anchor or damage it otherwise, then the master who caused the injury shall pay the damage in full, from his own money so far as his means will go, in case it occurred through his negligence or imprudence. If he cannot pay, *the ship is reponsible for the damage* (da gielde Skibet Skaden) but not the goods of merchants.

3 Pardessus Lois Maritimes, 261.

This article was reproduced in almost the same words in the code of King Christian V of Denmark in 1683.

3 Pardessus, 289.

As has been well pointed out by the latest writer on the law of collisions, the formal statement of the legal theory of looking *only to the value* of the offending *res* is essentially a speculation of modern jurists. In the middle ages, the ship and freight were all that could be reached in case of a *foreign* ship-owner. Why should the *domestic* ship-owner fare worse? Once this idea had taken fixed possession of ship-owners, there soon came to be a customary law to that effect.

Prien, Zusammenstoss von Schiffen, p. 1030, Berlin, 1896.

In the practical working, the offending *res* must answer en-

tire, taking its value at the time of the injury or when it first reaches port. It is a later development that allows a personal liability limited to the value of vessel and freight. First grew up the real, special liability of the offending ship, set apart and devoted to reparation of the damage.

Obviously the sufferer has this in full. He cannot be postponed to the owner's creditors by contract. If his right is to be subject to the maxim *qui prior est tempore*, curious results will follow. Even the wife's right of dower, which was formerly recognized in vessels, would then have a priority. Indeed, in laws taken from those drawn by civilians, ignorant of the exigencies of commerce, the wife had a priority, if the date of her marriage settlement was before the other claims

Ch. 35 Valencian Regulations, 4 Black Book of Admiralty, p. 489.

That modern continental countries have reverted to different views, and have cut off the sea courts from their earlier jurisdiction is no sound argument against the adherence by this Court to ancient admiralty usages.

In Portugal there is no lien for collision (*City of Mecca*, 4 Asp., 412). And it is doubtful if any such lien is recognized in Scotland. (The *Dunlosit*, House of Lords, November 1896). But these defects in the law can have no analogies here. The lien of cargo against the carrying ship is not part of the present law of Scotland, England (*The Victoria*, 12 P. D., 105) or Canada, but this Court enforced it, as a rule or maxim of the sea law, even in case of a Canadian vessel which loaded in an English port.

The *Maggie Hammond*, 9 Wall., 435.

The whole system of the present Continental laws is so widely dissimilar from our procedure, allowing the lien *in rem* to all damage sufferers, as to make their codes no authority, even for the limited purpose of comparing liens with privileges.

This Court has recognized the wide departure of these codes from the general maritime law.

Liverpool Steam Co. *v.* Phœnix I. Co., 129 U.S., 444.

In view of the increasing frequency of collisions at sea, it is impossible to think that this Court will recede from its ancient position. It is no time now to abate any of the old restraints and remedies of the maxim, formulated by Roman lawyers, and reproduced in the Institutes, *alterum non laedere.*

Effectual redress of damage by collision requires the procedure *in rem.* To put off the collision claim upon any fraction of the culpable *res* is to abandon our distinctive procedure of holding the offending vessel as a pledge for reparation. The sufferer cannot be required to look for his remedy through the different titles, encumbrances and interests that are included in the *res.* He is therefore not to be postponed to debts for fuel, or supplies, which existed before the beginning of the voyage on which the casualty occurred.

In the *Main*, 152 U. S., 122, this Court held that statutes curtailing recovery of collision damage, and abridging the rights of damage sufferers, should be strictly construed. To postpone their rights to the coal bills and supply liens would be a means of rendering the collision remedy wholly illusory.

For these reasons, it is submitted that the question certified should be answered in the affirmative.

HARRINGTON PUTNAM,
Advocate for Appellants.

January, 1897.

Appendix.

A. P. Veazie *vs.* Schr. "Frank Herbert."

U. S. Distr. Court—Distr. of Mass.—June Term, 1878, No. 700.

Opinion:

Collision, Liens.—This vessel was arrested in a cause of collision, the owners did not appear, and on a hearing *ex parte* the damages were assessed at $867.47. The vessel was sold by the marshal and produced, net, $790.77. A petition was filed by the mate and one seaman for wages. Another petition was filed by a material man, J. P. Whitcomb, for repairs. The ship was owned in Massachusetts, the collision occurred near the coast of the State, April 22, 1878, and she put into Provincetown, where the repairs for which Whitcomb now petitions were put upon her by order of the master, beginning on the 27th of April. The libel was filed May 1, 1878, and most of the work was done after the marshal took possession. The petitioner took the requisite measures to obtain a lien under the law of the State.

J. C. Dodge, for libellants in collision.

O. W. Holmes, Jr., for Whitcomb.

West & Gould, for seamen.

Lowell, J. In the pressure which is upon the Court at this time, I will merely state my conclusions.

1. The seamen whose voyage was ended or nearly ended at the time of the collision cannot compete against the libellants in collision, or at all events, not without decisive evidence that the owners are insolvent. See the *Benares*, 7 Notes of Cases, Suppl. 50; the *Linda Flor*, Swabey, 309; the *Enterprise*, 1 Lowell, 455, and cases there cited.

2. I agree with the argument that repairs put upon the vessel after notice of the *lis pendens* would usually be postponed to the damages recovered in the litigation. I am further of the opinion that the priority given to material men by the statute of the State will not control this rule, because the statute supposes the materials to have been supplied innocently and under due authority. It does not intend to give power to an owner to supersede a lien already in litigation by ordering repairs to be put upon his vessel, and if it did I should much doubt the constitutional power of the Legislature to effect that purpose.

But as our statute of limited liability makes the ship and her owners liable only for the value of the vessel after the collision, I should say that any value that has actually been added since may be deducted again and allowed to the owners or to the material men in their interest. If, therefore, it can be proved, as was suggested, that the ship was actually injured to the extent of the repairs or to some extent, the petitioner may be allowed, from the proceeds, the amount of such enhanced value. I do not find as a fact that there was such an enhancement, but leave the matter to proof. I should hope, however, as the amount to be distributed is small, that the parties would adjust the controversy without further expense.

Petition of seamen dismissed.
Petition of Whitcomb to stand for evidence.

No. 175.

Brief of Lichliter for Appellees

Filed Jan. 21, 1897.

Supreme Court of the United States,

OCTOBER TERM, 1896.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

No. 175.

THE STEAM TUG "JOHN G. STEVENS," HER ENGINES, &c., EDWARD H. LOUD, AND OTHERS,

Claimants and Appellants,

vs.

FREDERICK H. GLADWISH, AND OTHERS,

Libellants and Appellees.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Brief on Behalf of Appellees.

J. H. LICHLITER,
Proctor for Appellees.

MARK ASH,
Of Counsel.

INDEX.

	PAGE
Statement of Facts	2
Question certified by Circuit Court of Appeals	2
Cases in conflict in District Courts	3

POINTS.

I. A maritime lien is not a mere privilege to arrest the vessel for debt, but a property right or interest in the vessel	4
The Supreme Court cases deciding that a maritime lien is a *jus in re*	4
The cases determining that the general maritime lien and the statutory lien for domestic supplies stand on the same footing in a Court of Admiralty	5
II. The material man's lien and the damage lien caused by negligent towage, both arise out of a voluntary contract with the tug and the former lien being earlier in conception, and for the benefit of the latter, is preferred	6
The rule of payment of liens in the inverse order of their creation inapplicable, where the later lien does not benefit the vessel	7
Where the earlier claim stands in no relation of "demerit or obligation" to the later one, the rule is *qui prior est tempore, potior est jure.*	8
III. The lien for negligent towage, is analogous	

PAGE

to that of cargo damage, which is inferior to the lien for materials and supplies. 10

The authorities holding that the relation of vessel in tow to the vessel towing, is similar to that sustained by cargo—collated. 10

The lack of precedents in England as to rank of the two competing liens, because cargo damage liens are not allowed there. 10

The priority of liens *ex contractu*, however, well settled in other countries. 11

The continental authorities and the Consulado de la Mer as to the inferior rank of cargo damage liens, collated. 11

IV. A lien arising *ex dilecto* does not out-rank one arising *ex contractu*, as a mere matter of legal rank irrespective of other considerations. 14

The cases holding damage for negligent towage to be a tort, examined and shown to be no authority on the question of rank. 15

Whether a claim is one of contract or for tort, not a test of priority. 15

Cases of tort, pure and simple, and those *ex delicto quasi ex contractu*, distinguished. 16

The considerations in favor of the priority of the appellees' lien over the damage lien of the appellants, stated. 17

V. The origin and nature of the lien for materials and supplies and the lien for collision stated and compared. 18

A. The lien for material and supplies. The cases in this Court showing the origin and nature of the lien, and its derivation from the civil law. 18

B. The lien for collision not recognized save in few of the codes of continental countries. 22

The lien doubted in this country until the year 1867. 23

PAGE

The lien recognized in this Court, in 1867, upon authority of the English case of the *Bold Buccleugh*. 23

The allowance of the collision lien in England, due to a misunderstanding of the ancient proceeding *in rem*, which was only a means of compelling an appearance. 24

The historical origin of the collision lien in England, stated. 25

VI. Shall the general maritime law in force among all the commercial nations of the world, except England, govern this Court in determining the comparative rank of the material men's lien and the collision lien? 27

The importance of the precedent to be established. 27

The admiralty and maritime jurisdiction of the United States, not limited by the restraining statutes or judicial prohibitions of England. 28

The general maritime law of the United States is the same as in all other commercial countries, except as modified by judicial decisions of this Court. 29

VII. Liens for materials and supplies take precedence of liens for collision. 31

The codes of the various foreign nations declaring the superior rank of contractual liens—collated. 31

The derivation of the word "lien" from the French and Latin denotes a meaning opposed to the granting of the privilege to a collision or damage claim. 32

The harmony of the various foreign regulations, with the law of this country, granting the the lien to the material man, as opposed by the English rule which denies a lien. 32

PAGE

The same harmony invoked to incline this Court to give the like preference to the repair and supply lien. 32

VIII. The authorities, which, it is claimed, give collision and damage liens a rank superior to antecedent repair and supply liens, examined and analyzed to show that none relied on, is in point. 33

Appendix containing extracts from the maritime codes of the principal continental countries on the subject of the rank of maritime liens. 47-58

French Code of Commerce. 47

Italian " " " 48

Belgian " " " 50

Code of the Netherlands. 52

German Code of Commerce. 53

The Maritime Law of Norway. 55

Code of Commerce of Spain. 56

Supreme Court of the United States,

October Term 1896, No. 175.

The steamtug "JOHN G. STEVENS" her engines, &c., EDWARD H. LOUD and others,
Claimants and Appellants,

vs.

FREDERICK H. GLADWISH, & ors.,
Libellants and Appellees.

Brief for Appellees.

This case comes before the Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit (Rec. p. 1). A decree in admiralty was made by the District Court for the Eastern District of New York, adjudging that the libellants and appellees, Frederick H. Gladwish and others, recover against the steamtug John G. Stevens, the amount reported due them by the commissioner with interest and costs, amounting in all to $218.07 and further adjudging that the lien of the appellees is a superior lien and entitled to priority over the lien of the appellants, Edward H. Loud and others, and that the balance of the proceeds of sale of the steamtug be paid out of the registry to the appellees.

The appellants took an appeal from the decree of the

District Court to the Circuit Court of Appeals, which thereupon certified the question stated below, in substance, upon the following facts, as set forth in the certificate (pp. 1 & 2).

Statements of Facts.

"1. That the home port of the tug is New York.

2. That between December 7th, 1885, and March 9th, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York, Chap. 482 of the Laws of 1862, thereby creating statutory liens on her.

3. That on March 8th, 1886, the tug "J. G. Stevens" was employed in the port of New York to tow the schooner "C. R. Flint" through the waters of said port, and while towing, negligently allowed the "Flint" to collide with the bark "Doris Eckhoff" in tow of the tug "R. S. Carter."

4. On March 16th, 1886, Loud, et al., owners of the "Flint", libelled the "Stevens" and the "Carter", in admiralty, in the District Court of the United States, for the Eastern District of New York, for the collision damage.

5. On March 16th, 1886, Gladwish, et al., libelled the "Stevens", in the same Court, to enforce their supply lien under the State law.

6. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000.

7. The Gladwish libel resulted in a decree condemning the "Stevens" for the coal supplied and costs, in all $218.07.

8. The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the "Stevens", leaving the Loud decree unsatisfied."

QUESTION.

Does the damage lien against the tug for negligent towage, outrank the prior lien for supplies?

Despite the fact that the towage of vessels in the har-

bors, ports and inland waters of this country has become an important part of commerce during the past fifty years, the question certified is for the first time presented to this Court, as well as the cognate point whether the collision lien of pure tort, outranks the material man's lien arising *ex contractu*.

Upon the precise question before the Court, the authorities in the District Courts are in conflict, those in the Southern and Eastern Districts of New York, (*The Samuel J. Christian*, 16 Fed. Rep., 797: *The Young America*, 30 Id., 789; *The J. G. Stevens*, 58 Id., 792,) preferring the material man's claim, while the District Court of New Jersey,(*The M. Vandercook*, 24 Id., 472,) and the District Court of Michigan, (*The Daisy Day*, 40 Id., 538,) hold the other way.

Upon the like important question whether a collision lien for tort, pure and simple, arising *in invitum*, and not like the lien for negligent towage, out of a voluntary contract with the vessel—outranks a claim *ex contractu*, there is also a conflict of authority. The Circuit Court for the Eastern District of New York, (*The R. S. Carter*, 40 Fed. Rep., 331,) gives the collision lien a priority, while the District Court for the Southern District of New York, (*The Amos D. Carver*, 35 Id., 665,) prefers the contractual lien.

As throwing a side light upon the subject in controversy, it may be added that the District Courts in the Southern and Eastern Districts of New York and Michigan have accorded priority to seamen's wages over damage liens, (*The Orient*, 10 Ben., 620; *The Samuel J. Christian*, supra, *The Daisy Day*, supra,) while the District Court of New Jersey, (*The Maria and Elizabeth*, 12 Fed. Rep., 627,) and the Circuit Court of Appeals in the Seventh Circuit, (*The F. H. Stanwood*, 49 Id., 577,) give the damage lien the preference even over seamen's wages.

In this conflict of authority in the Courts below, it is eminently desirable that this Court should settle the rank not only of the lien for a *quasi* tort, like the present, but also of the collision lien as against a lien for wages or supplies.

POINTS.

I.

A maritime lien is not a mere privilege to arrest the vessel for debt but a property right or interest in the vessel.

In the *Yankee Blade*, 19 Howard, 82, 89, 90, (1856), this Court through Mr. Justice Grier, said: "The maritime privilege or lien is adapted from the civil law and imports a tacit hypothecation of the subject of it. It is a *jus in re* without possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem."

"These principles will be found stated and fully vindicated by authority in the cases of the Young Mechanic, 2 Curtis C. C., 404, and The Kiersage, 2 Curtis C. C., 421."

Both the decisions referred to, in the case cited, were rendered by Mr. Justice Curtis in cases of liens given by statute in Maine for supplies and repairs to a vessel in her home port.

In the case of the *Lottawanna*, 21 Wall, 558, 579, this Court in considering a lien given by a Louisiana Statute for repairs held "A lien is a right of property and not a mere matter of procedure."

In the recent case of the *J. E. Rumbell*, 148 U. S., 1, Mr. Justice Gray in considering the status of a lien under an Illinois Statute for supplies furnished to a domestic vessel, examined this question again, and after citing, with others, the cases above mentioned, remarked, (p. 11,) that the view of Mr. Justice Curtis, in the cases of the *Young Mechanic* and the *Kiersage* "has been generally accepted in the Admiralty Courts of the United States."

Our adversary sought in the Courts below, to make some distinction between the status of a statutory lien and the lien given by the general maritime law.

Whatever may have been said as to this distinction in the earlier cases, it is now abundantly settled that the lien

given under the maritime law and the statutory lien for domestic supplies, stand as to their rank and enforcement, upon the same footing in a court of admiralty.

The Guiding Star, (Circuit Ct., Stanley Matthews, J.) 18 Fed. Rep., 263.
The General Burnside, (Circuit Ct., Baxter J.) 3 Id., 228
The Madrid, (Circuit Ct., Lamar, J.) 40 Id., 677.
The J. E Rumbell. 148 U. S., 1.
The J. W. Tucker: (2nd Circuit) 20 Fed. Rep., 129.
The Arctic, (2nd Circuit,) 22 Id., 126.
The Amos D. Carver, (2nd Circuit) 35 Id., 678.

In the *Guiding Star*, ibid, Mr. Justice Matthews, after examining the question, gave his conclusion in the following language:

"So that, in enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity when they apply it. Everything required by the statute as a condition on which the lien arises and vests, must, of course, be regarded by courts of admiralty, for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. *The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles.*" 18 Fed. Rep., 268. This language of Mr. Justice Matthews was quoted with approval by Mr. Justice Gray in the Rumbell Case 148 U. S. 20.

In the *Madrid*, ibid, Mr. Justice Lamar, after alluding to the then conflict of authority in the Circuits upon the question, proceeded to consider it upon principle and concluded:

"There would seem to be no reason, on principle, why the lien created by the local statute should not rank with the lien given by the general maritime law. They each have as a basis the furnishing of necessary supplies to the ship, upon the credit of the ship itself. In each instance the contract is maritime. The proceedings by which the lien, in each instance, is enforced are identical. * * * It would seem, therefore, that this lien given by the local statute, based, as it is, upon the same sort of necessaries as constitute a lien under the maritime law, (the contract for furnishing these supplies being maritime, and capable of enforcement by proceedings *in rem* only in the admiralty courts of the United States, under the same rules and proceedings as the general maritime lien,) is itself in the nature of a maritime lien." 40 Fed. Rep., 681.

In the *J. E. Rumbell*, ibid, Mr. Justice Gray, after collating the cases upon the question, uses this language: "According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by a statute of a State, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage (that was the precise point before the Court in the case), that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. * * * The admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.,' 148 U. S., 19.

II.

The material man's lien and the damage lien caused by negligent towage, both arise out of a voluntary contract with the tug, and the former lien being earlier in inception, and for the benefit of the latter, is preferred.

Regarding a maritime lien, then, as a *jus in re*, a property interest in the vessel, the question next present-

ed is, what rank is accorded to it with reference to a lien of subsequent inception.

1. The later claim may be preferred to the earlier one, owing to laches in the enforcement of the earlier [*The J. W. Tucker*, 20 Fed. Rep., 129 and cases cited on pp. 133 and 134.] No such principle is applicable in this case, as both claims accrued and *were enforced contemporaneously*, the supplies being furnished between December 7, 1885, and March 9, 1886, and the claim for damage arose March 8, 1886. Record pp. 1 & 2.

2. The later lien may be preferred to the earlier one, as the latter is benefitted or preserved by the former, as for example, later claims for repairs have priority over prior claims of the same kind, as these repairs by preserving or enhancing the value of the vessel, benefit the older lien. (*The Omer*, 2 Hughes, 86, *The Melita*, 3 Ibid, 194.) Upon the same principle, bottomry bonds are preferred in the inverse order of their creation, (*The Brig Magoun*, Olcott, 55, 66; *The Sydney Cove*, 2 Dods, 1,) and a later salvage takes precedence over a prior salvage "because the last service has preserved the benefit of the former." (*The J. W. Tucker*, 29 Fed. Rep. 129, at p. 132.) This rule is of ancient origin. 3 Twiss, Black Book of the Admiralty, c. 61, p. 163, 2 Valin. Comm. 12 liv. 3, title 5, art. 10.

"But the principle governing such cases," says Mr. Justice Blatchford in *The F. J. Fowler*, 17 Fed. Rep., p. 656, "is, that the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination; and that 'each foregoing incumbrance therefore, is actually benefited by reason of the succeeding incumbrance.' This principle can have no place except where services are rendered, such as loaning money, furnishing supplies, making repairs, salvage and claims arising out of contract, generally; such services benefit the vessel, make her better, preserve her, contribute to save her or improve her or keep her in running or going order for the benefit of all who have prior liens or claims on her. But a second tort or collision can have no such effect in reference to a party injured by a prior tort or collision. The second tort or collision does not benefit the vessel or add to her value or preserve her. It only tends to injure her, and the sufferer by the first tort or

collision, in having recourse against the vessel after a second tort or collision, must take her as he finds her, damaged, perhaps, by a second collision. He ought not to lose the benefit of his lien arising out of the first tort or collision, unless the circumstances are such that in judgment of law he may fairly be held to have waived his lien, or postponed it, as regards the lien arising out of the second tort or collision."

These observations of Mr. Justice Blatchford are made in comparing the rank of successive claims for tort, arising out of negligence in the performance of a towage contract, but the reasoning is applicable with greater force in the ranking of an earlier lien arising *ex contractu* with the subsequent lien arising *ex delicto*. For if a lien for a claim which in no way tends to benefit the vessel or enhance her value, is thus given a priority, the inevitable and necessary conclusion follows that such preference will also be accorded to an earlier lien for supplies or repairs which does in fact tend to the betterment of the vessel, while the later lien for damage tends only to the injury of the vessel and diminishes her value.

3. Where, then, the earlier claim stands in no relation of "demerit or obligation" to the later one, the rule is "*qui prior est tempore, potior est jure.*" That rule, which we invoke in the case at bar, was adopted in the District Court (58 Fed. Rep., 792).

Maclachlan in his Treatise on Shipping, (3 Ed. p. 703,) in considering the rank of successive claims for collision, clearly emphasizes this underlying principle that the earlier claim is preferred, as it stands in no relation of "*demerit or obligation*" to the later one, in the following language: "Of two successive collisions with the same ship, *the sufferers by the earlier, standing to the sufferers by the later, in no relation of demerit or obligation, retain their priority of claim against the fund* on the principle of the legal maxim, *qui prior in tempore, potior est in jure.*"

The ranking of claims according to the time of their inception has been a settled principle of admiralty jurisprudence from the earliest times.

In 4 Twiss, *Black Book of the Admiralty*, p. 47, a translation of the ordinance of the Maritime Court of the Noble City of Amalphia, commonly called the Amalphiton Table touching the rank of those who have advanced money to build the ship—is as follows:

"And if by chance the said vessel shall have made a voyage and shall afterwards be sold at the instance of the said creditors, the purchase money received for that vessel ought to be distributed in this manner; first one ought to pay the servants and mariners of the ship for that which it is acknowledged that they ought to receive for their pay, *and then those who are proved to have lent money on the building of such ship according* **as each has priority in time."**

In the case of *The Jerusalem*, 2 Gallison, 345, Mr. Justice Story, in considering [p. 350] the relative rank of a bottomry bond, and a later claim for repairs, said that upon general principles, the rule would seem to apply *qui prior est tempore, potior est jure*, and only gave the later claim a priority, because the repairs were indispensable for the security of the ship, *and actually increased her value.*

In the case of *The F. J. Fowler*, supra, Mr. Justice Blatchford followed this rule, using the following language: "There is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor" (17 Fed. Rep., 656.)

The District Judges of the Eastern and Southern Districts of New York, have also followed the rule of priority we have last set forth. (*The Samuel J. Christian*, 16 Fed. Rep,, 796; the *J. W. Tucker*, 20 Id., at p. 133; the *Young America*, 30 Id., 789, and the case at bar, 58 Id., 792.)

III.

The lien for negligent towage, is analagous to that of cargo damage, which is inferior to the lien for materials and supplies.

The relation of the vessel in tow to the vessel towing, has been considered by the authorities as similar to that sustained by cargo.

The Alabama & Gamecock, 2 Otto, 695, at p. 697.
Sturgis vs. Boyer, 24 How., 110, at p. 122.
J. P. Donaldson, 21 Fed. Rep.,671, at p. 680.
Young America, 30 Id., 800.
Daisy Day, 40 Id., 538, at p. 540.

"Conceding therefore, that a vessel in tow and without fault is to be regarded as sustaining the same relation to the collision which is sustained by cargo (and it seems fair thus to consider it,") etc. Bradley J. in *Alabama & Gamecock*, supra at p. 697.

"The master of the towing vessel commands and directs, not only his own, but the vessels in tow, as though all together constituted but one ship; the tow is intrusted to his care * * * and subject to his power *as though it was mere freight.*" Matthews J., in the *J. P. Donaldson*, supra.

"Where the tow is completely under the control and management of the tug, the case, as respects the point under consideration [*i. e.* the question of priority] is perfectly analagous to injury of cargo on board the guilty ship." Brown J., in the *Young America*, supra.

This similarity of relation of the lien for negligent towage, and that of cargo damage, was conceded by our adversary in the courts below.

As before stated, (p. 3) there are no precedents to the point at the head hereof, in this Court, and none in England, for damage liens to cargo are not allowed there.

The Gratitude, 42 Fed. Rep., 300.
Maclachlan vs. Shipp., (3 Ed.,) p. 108.

In the District Courts, there is a conflict, as also before

stated, between the cases of *Samuel J. Christian*, the *Young America*,, the *Gratitude*, the *J. G. Stevens*, supra, which prefer the material man's lien, while the *M. Vandencook* and the *Daisy Day*, supra, hold that the damage lien takes precedence.

The rule is well settled in other countries, as shown in the elaborate and exhaustive consideration of the question in the case of the *Young America*. It is there said:

"The maritime law, as embodied in the codes of the principal maritime nations from the Marine Ordinance of Louis XIV, downward, not only gives no support to the doctrine that damage liens are entitled to a priority over liens *ex contractu*, but affords abundant evidence to the contrary. In the ordinance of 1681, the damage claims of merchant freighters were ranged in the last rank, below the liens of seamen or material men that accrued during the voyage or prior to departure." Then, considering the low rank given to collision by these foreign Codes, the Judge proceeds: "But, however the relative rank of collision may be ultimately determined, I find nowhere in the general maritime law, any countenance to a priority of liens for mere *quasi* torts, such as negligence in the execution of contracts. The relative rank of such liens in the judgment of the general maritime law, is expressly determined by a great number of codes, from the ordinance of 1681, downward. It is mentioned in almost every modern code, and in every case has a lower rank than wages, bottomry or necessary supplies for the voyage. French Code de Com. art. 191, § 11; German Code, art. 772, § 4; Netherlands Code, § 313, subd. 10; Italian Code, § 674, subd. 11; and numerous others, including the Codes of Belgium, Spain, Portugal, the Argentine Republic, Egypt, Chili and Brazil, referred to by Desjardins in Droit Com. Mar., vol. 1, p. 292, §§ 156-158." and thereupon, Judge Brown concludes: "Where the tow is completely under the control and management of the tug, the case, as respects the point under consideration, is perfectly analogous to injury of cargo on board the guilty ship. The owners of the tow, in engaging towage, voluntarily put the tow in charge of the tug as completely as the cargo owner does his goods when he puts them on board. This implied security is the value of the vessel as she is, with no right to postpone prior lienors who are not guilty of laches or fault. The same rank in order of preference should therefore be assigned to in-

juries to the tow, as to injuries to goods on board the offending vessel, and this, as we have seen, is posterior to liens for supplies, where no laches exists." 30 Fed. Rep., 799 and 800.

See translations of the Codes of France, Italy, Belgium, the Netherlands, Germany, Spain and Norway in the Appendix.

Neither of the two cases denying the superiority of the repair and supply lien, contains any reference to this universal rule of the maritime law, nor makes any distinction between lien for collisions, pure and simple, and damage liens for negligent towage, nor recognizes the analogy of the latter with liens for cargo damage.

The *M. Vandercook*, regarding the claim for negligent towage as arising *ex delicto*, awards it priority over claims *ex contractu* without further discussion, upon the strength of an extract from *Abbott on Shipping* and a dictum in *Norwich Co. vs. Wright* in this Court, which we show hereafter (p. 42,) do not at all sustain the principle for which they are cited.

The *Daisy Day* follows the *M. Vandercook*, without citing any additional authorities on the question of preference, but with the modification, "that the question whether a claim is one in contract or for tort is by no means a sure test of priority," the decision destroys the very basis of the case it follows, which awarded the greater rank to the damage lien solely because it arose *ex delicto*.

The criticism made by our adversary in the court below, after a careful and searching examination, no doubt, of all of these maritime regulations of other commercial nations so ably collated by Judge Brown, was confined to the French Projet of 1867 and the Italian Code of 1882.

As to the former, the claim was it never became a law. But the French Code of Commerce, Sec. 191, (See Appendix) providing for privileged debts makes no mention whatever of liens for collision.

As to the Italian Code of 1882, it was claimed that by Section 661, personal injuries and death claims are privileged in case of insufficiency of the sum to be distributed.

This Section is in title 8, which refers to the subject of "collision" only, and regulates *among themselves* the privilege of several claims which arise out of the same collision. But that title does not relate to the general subject of privileges, which is specially treated in title 9. Section 666, under the latter title, declares that the privileges enumerated therein are preferred to every other privilege, general or special, and Section 674, in this title, defines these privileges, and gives the order of their rank, and while it puts damage to cargo in the eleventh rank and below necessaries, *it does not mention collision at all*, which is consequently accorded no preference. (See Appendix.)

Our adversary laid great emphasis in the courts below upon an extract from Chap. 18 of Consulat de la Mer, taken from the Black Book of the Admiralty, Twiss, Vol. 3, p. 83, which states that the managing owner of the ship ought to make good all loss the merchant may incur from his goods becoming damp, "*so far as the means of the managing owner will suffice*, and if they do not suffice the ship ought to be sold *without the part owners or the creditors having any preference.*" This does not declare that the merchant shall have any preference for his cargo damage, but only that he shall stand *upon the same footing* as the part owners and creditors, and then only after he has exhausted his remedy against the managing owner. What rank or priority shall be accorded to the merchant, part owners and creditors as a class among themselves, after the sale of the ship, does not appear.

By comparison with the following later provision of the Consulado, Black Book, (Twiss, Vol. 3, p. 245,) it would seem clear that what was intended by the words "without the part owners or the creditors having any preference" was that these persons had no right to object to the sale of the ship to pay the cargo damage.

"If a managing owner freights his ship to merchants for a lump sum or for so many quintals, and if the managing owner shall place or carry goods on the deck * * * if the goods which are placed on deck * * * are lost or spoilt * * * the merchants are not responsible. * * * But the managing owner of the ship is to replace and restore all these goods, which, for the above reason, have been

lost or spoilt, or the value of them, to the merchants to whom they shall belong. And if the managing owner of the ship has not wherewithal to pay, he ought to sell the ship, *which neither part owner, nor creditor nor anybody else can object to*, nor ought to dispute, for any reason saving the mariners for their wages."

A similar provision, [Twiss Black Book, Vol. 3, p. 465], where loss is sustained by the merchants to their goods, by reason of the vessel rendering a salvage service, concludes "the managing owner of the ship or vessel shall be responsible to them for all the loss which they have sustained through his fault. And if he shall not have wherewithal to indemnify them, then the ship or vessel ought to be sold, and no one can object in any way, saving always the claims of mariners for their wages."

Taking these several provisions *in pari materia*, it is absurd to claim that the first which is relied upon by our adversary, decides anything as to the *rank* of the cargo damage claim.

IV.

A lien arising ex delicto does not out-rank one arising ex contractu, as a mere matter of legal right, irrespective of other considerations.

Our adversary seeks to avoid the effect of these authorities placing his claim and ours in the same class, because both arise out of a voluntary relation with the vessel,—by insisting that damage by negligent towage constitutes a tort, and therefore, *eo ipso*, outranks a claim based upon contract. Granting that injury by negligent towage is considered a tort according to the authorities cited against us, (*The Quickstep*,9 Wall., 665, *The Brooklyn*, 2 Ben.,547, *The Deer*, 4 Id., 353), none of the cases, upon examination, sheds any light upon the contention that a claim *ex delicto* fastens a lien upon a vessel of greater virtue than a lien arising *ex contractu*. The comparative rank of these

liens was neither in question nor discussed in the cases mentioned, which turned solely upon the point that injury by negligent towage does not arise out of the contract to tow, "but the obligation of the steamboat not to commit the tort arose out of the principle, applicable in all cases of tort, *sic utere tuo ut non alienum loedus.*" (Mr. Justice Blatchford in the Brooklyn, 2 Ben., at p. 551.)

A careful examination of the treatises and authorities, has failed to disclose a single case giving precedence to a maritime lien solely and only because founded on a tort. Where such superiority has been recognized, the underlying principle has been, as far as we could discover, the relation of "*demerit or obligation*" of the prior maritime lien, whether based upon contract or tort, to the subsequent lien of damage. Vide the remarks of Mr. Justice Blatchford, in the *F. J. Fowler*, (172 Fed. Rep. 656), supra.

"Besides, the question whether the claim is one of contract or for tort is by no means a sure test of priority." Severens, J., in the *Daisy Day*, 40 Fed. Rep., at p. 640.

Further strength to the contention that a claim founded in tort gives no superior lien of itself, is derived from the following guarded language adopted by Mr. Justice Blatchford in the *R. S. Carter*, 40 Fed. Rep., 332, where he had before him for determination the comparative rank of claims of material men and damages for collision:

"Moreover, the question is not between a wages claim *nor between material men and a claim arising out of a quasi tort, where the cause of action is a neglect of some duty assumed in pursuance of a voluntary agreement between the parties.* The claim of Loud is for *damages caused by collision pure and simple*, committed by the R. S. Carter."

If this rule of superiority were applicable alike to all cases of tort, the explicit reservation made by the learned justice, in these words, would be meaningless, and it is more than ordinarily significant, as he had then, indirectly but clearly, brought before him in this *R. S. Carter* case, the very question invoked in the case at bar, the claim of Loud there for damages being the identical claim here, the R. S. Carter being also held responsible as the tug

having in tow the bark Doris Eckhoff, which collided with the schooner Flint in tow of the tug J. G. Stevens. (See the Record in this case, fol. 2, the R. S. Carter, 40 Fed. Rep., 331.)

That there is a distinct and essential difference, in the contemplation of law, between cases of tort, pure and simple and these cases *ex delicto quasi ex contractu* would also appear from the views of Mr Justice Daniel in the leading case in this Court of the *New Jersey Steam Nav. Co. vs. The Merchants Bank*, 6 How., 344.

True, the learned Justice dissented in the decision in the case referred to, but the following remarks from his opinion would still be pertinent in emphasizing the distinction we are seeking to make. The question involved in the case, was the jurisdiction of admiralty of a claim against a steamboat company, for the loss of specie carried in their boat by an express carrier, and lost by fire on Long Island Sound. To meet the objection to the jurisdiction deduced from the character of the contract of carriage, the libellant insisted that the foundation of the suit was a marine tort, which having been committed on Long Island Sound, and therefore not within the body of a county, was exempt from the objection (of the law as it then stood following the English rule) on the score of locality. Mr. Justice Daniel, in combatting this proposition that the claim was a pure tort, discussed the class of cases in which a plaintiff having a right of action arising on contract, might waive his remedy directly upon the contract in form, and allege the *gravamen* as originating in tort produced by a violation or neglect of duty. One of this class of cases, not necessary to refer to here to elucidate the distinction we are seeking to make clear, was in which independent of the plaintiff's rights arising from express stipulations with the defendant, there are duties incumbent upon the latter resulting from the peculiar position he occupied with respect to the public, giving the right to all who may suffer from the violation or neglect of their public obligations. "Second, they are cases" says Mr. Justice Daniel, 'in which a kind of *quasi tort* is supposed to arise from a violation of the contract between the parties. (An exact example is the case at bar). These cases, although they

are torts in form, are essentially cases of contract. The contract, therefore, must be referred to, and substantially shown to ascertain the right of the parties, and to measure the character and extent of the redress to either of them. It can in no material feature be departed from. This I take to be the *rationale* of the practice, and the view here taken appears to be sustained by authority." 6 Howard, 410-412.

Liens for tort therefore not being accorded a priority merely because grounded in the wrong of the vessel, what are the principles, aside from authority, which should prefer the material man's lien to the lien of Loud in the present case?

These considerations are well stated in the opinion of Judge Benedict in this case in the District Court: "The claims of Loud, (the appellant,) although in a certain sense *ex delicto*, arises out of neglect on the part of his employee in the performance of a contract voluntarily entered into by Loud. Loud selected a careless tug to tow the Flint, and suffered thereby. It was at his option what tug should be given the opportunity to injure the Flint. In the exercise of this option he selected a careless one, responsible, indeed, to him for any damage to the Flint caused by negligence, but given the opportunity to do damage to the Flint by the voluntary act of Loud. In this respect, the claims of Gladwish, Mequin & Co., (the appellees,) and Loud stand on the same ground." 58 Fed. Rep. at p. 793.

The same Judge had before him in the *Samuel J. Christian*, supra, two competing liens exactly the same as in the present case. He preferred the eailer lien of the material man in language which we have already quoted, and a part of which we repeat: "A different rule applied in the present case would give to McNab (the damage lienor) a security for his demand greater than the security upon which he entered. He would be paid out of the proceeds of the tug, discharged of the liens of the material men; whereas, when his contract was made, the tug was subject to those liens." 16 Fed. Rep., 798.

Judge Brown in the Young America, supra, preferred the earlier lien of the material man for similar reasons, among others, using the following language already quoted, supra: "The owners of the tow, in engaging tow-

age, voluntarily put the tow in charge of the tug as completely as the cargo owner does his goods when he puts them on board. This implied security is the value of the vessel as she is, with no right to postpone prior maritime lienors who are not guilty of laches or fault." 30 Fed. Rep., at p. 800.

A further discussion of the point in controversy, in this case, demands a consideration of the cognate question of the priority of the repair and supply lien over the collision lien, as whatever is to be found in the English cases pertains solely to the preference of liens for collision, no liens, as already stated, being allowed for damage to cargo or for negligent towage, and no liens for repairs or supplies except in a certain few special cases hereafter alluded to.

Before considering this question of priority, however, it seems proper to show the difference between the law of this country and of the other commercial nations, both ancient and modern, which recognize to the fullest extent the lien of the material man, and England which does not, and also make clear the comparatively recent origin of the collision lien both in this country and England as distinguished from other countries, which give no lien for collision whatever.

V.

The origin and nature of the lien for materials and supplies and the lien for collision, stated and compared.

A. The lien for materials and supplies.

The lien has been consistently recognized and enforced by this court as contradistinguished from the English courts, from the earliest to the most recent times.

The *General Smith*, 4 Wheaton (1819), 438, the first

leading case in this Court, which Mr. Justice Bradley stated in the *Lottowanna*, 21 Wall., 558, (1874) had then been adhered to for more than fifty years—held that where repairs had been made or necessaries furnished to a foreign ship, or a ship in the port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit *in rem*, in the admiralty to enforce his right.

In the *St. Jago de Cuba*, 9 Wheaton, 409, (1824) Mr. Justice Johnson, speaking for this Court, gives the reason for the lien of the material man as follows: "The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wind and legs" to the vessel "to get back for the benefit of all concerned; that is to complete her voyage." "The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo, is *sub modo*, subjected to this necessity," 9 Wheaton, 416.

In Cunningham vs. Hall, 1 Clifford 43, (1858) Mr. Justice Clifford sitting at Circuit, gave expression to the same views as those of Mr. Justice Johnson that a lien was given by the maritime law for repairs and supplies furnished in a foreign port "for the plain reason that repairs and supplies in a foreign port *are no less essential than the services of the mariner* to furnish 'wings and legs' to the ship for the purpose of enabling her to complete the voyage for the benefit of all concerned."

In the case of *Thomas vs. Osborn*, 19 How., 22, Mr. Justice Curtis in 1856, delivering the judgment of this Court, referred to certain English cases decided as late as 1853 as settling definitely the law of England "that the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel." "The decisions rest merely upon the want of authority in the master, according to the law of England, to create by his own act, an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise—in

harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally for repairs and supplies, and he does so without any express hypothecation, when in case of necessity, he obtains them on the credit of the vessel without a bottomry bond (citing authorities in this country.)" 19 How., 27-30.

Mr. Justice Curtis refers in his opinion in the case last cited, in support of the proposition that it not material whether the hypothecation is made directly to the furnisher of repairs, or to the one who lends money on the credit of the vessel, in a case of necessity to pay such furnisher, to a quotation by Valin: "Through all time by the use and custom of the seas, it has been allowable for the master to borrow money, on bottomry or otherwise, upon the hull and keel of the vessel, for repairs, provisions and other necessaries, to enable him to continue the voyage," (Com. on Art. 19, Ord. of 1681,) and further to the following ancient and more recent laws, treatises and commentators: The Roman law, *de exercitoria actione* D. 14, 1; *the Consulate del Mare*, ch 104, 105, 236; the Laws of Wisby, Art 13; the Laws of Oleron, Art. 1; Le Guidon, ch. 5, Art. 33; the French Ordinance of 1681, Art. 19; Emerigon's Con. a la Grope, ch. 4, sec. 11, Vol. II, p. 484; Kuricke, 765; Loccenius, lib. 3, ch. 7 n. 6; Stypannus 417, n. 107; Boulay Paty *Cours de Droit* Com., tit 1, sec. 2, Vol. I, p. 39, and tit. 4, sec. 14, Vol. I, pp. 151, 153; Pardessus *Droit Com.*, Vol. III, a. 631, 644, 660; and Pardessus Col., Vol. II, p. 225 note.

"*By the Civil Law*," says Mr. Justice Clifford, in *The Kalorama*, 10 Wall, 204. (1869.) "a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, *whether the vessel was at her home port or abroad* when the repairs and supplies were made or furnished (citing authorities)."

In the *St. Lawrence*, 1 Black, 522, (1861,) this Court had held however, following the General Smith, supra, that the principles of the civil law by which a lien is given in the case of a domestic vessel, formed no part of the gen-

eral maritime law, but were part of the local law of the countries which had adopted the civil law, and consequently were not part of the admiralty and maritime jurisdiction of the United States.

It is quite clear, however, that at a very early period in the history of the commerce of this country, credit to vessels in their home ports became as necessary "to furnish wind and legs" on the coming voyage, as in foreign ports to continue and complete the voyage.

As early as 1784, Pennsylvania passed a law allowing persons fitting out and furnishing vessels for a voyage to sue in admiralty as mariners sue for wages. (See *The Lottowanna*, 21 Wall, 558.)

The *General Smith*, supra, decided in 1819, denied a lien on a domestic vessel because the law of Maryland did not afford it.

Peyroux vs. Howard, 7 Peters, 324, decided in 1833, enforced a lien for labor and materials on a domestic vessel given by the law of Louisiana.

In 1844, when this Court promulgated the rules of practice in admiralty, the 12th rule expressly provided for the enforcement, in admiralty, of liens given by the local law on domestic vessels. In 1858, the rule was amended by forbidding proceedings in *in rem* in cases of domestic vessels, but in 1872, the rule was again restored as in force previous to 1858.

The current of authority in this court and the district courts, furnishes abundant instances of the enforcement of these statutory liens in admiralty, and in the very latest utterance by this Court (1892) on the subject, of a lien given by an Illinois statute on a domestic vessel, Mr. Justice Gray declared the following propositions, as established by the decisions of this Court, no longer doubtful:

1st. For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, *following the civil law*, and may be enforced in admiralty.

2nd. For repairs or supplies in the home port of the

vessel, no lien exists, or can be enforced in admiralty, under the general law independently of local statute.

3rd. Whenever the statute of a state gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the Courts of the United States." The *J. E. Rumbell*, 148 U. S.

Recognizing, as this court will, the high privilege accorded from the very beginning by the admiralty courts of this country, to the lien of the material men following the broad and enlightened principles of the civil law, rather than the narrow view of the English courts which allowed no lien for repairs or supplies until recent times, and then only as to foreign vessels in English ports (3 & 4 Victoria, Ch. 65, § 6) and as to English vessels repaired in ports outside of Great Britain, Ireland and the Channel of Irelands, (19 & 20 Victoria, Ch., 97, § 8), it is noteworthy that the lien for collision is in many commercial countries not recognized at all, and in England and the United States has been doubted until the latter half of this century.

B. The lien for collision.

"Express mention of damage by collision is found in comparatively few of the modern codes. * * * Many of the maritime codes of Europe, like that of France, give no special privilege upon the ship for damages by collision. Redress is obtained by suit against the master and owner, who are held for the whole damage except upon a surrender of the value of the ship and freight, taking no aoccunt of any lien arising *ex contractu*. Valin Comm. L. 3, T. 7, Art. 10; Emerigon, 1, 418; 5 Desjardins Droit Com. Mar. 93" Brown, J., in the *Young America*, 30 Fed. Rep., 799, in which an exhaustive consideration of the ancient and modern authorities on damage liens and their rank will be found. (See also translation of foreign codes in Appendix.)

"And in the maritime codes of all the principal maritime couatries for more than 200 years at least, no lien or

privilege for pure torts, or for damages arising from collision, except as regards injuries to the ship's own cargo, involving a breach of her contractual relation, has ever been allowed, until within a recent period in England and this country, and in a few recent codes, which have allowed in collision cases a privilege of a very low rank." Brown, J., in *The City of Norwalk*, 55 Fed. Rep., 98, at p. 111.

Parsons in his treatise on Shipping and Admiralty (published in 1869) states the matter thus cautiously :

"By the later and better authority, it would seem that a collision gives to the suffering ship a lien on the ship causing the damage," and cites a case in this country [The Creole, Legal Intelligencer, May 7, 1852,] in which Judge Kane, [of the Eastern District of Pennsylvania] said that though *there was properly speaking no lien in collision, because the subject was tort*, yet the vessel would be liable even in the hands of a purchaser.

While there are cases in this Court (*The Brig Malek Adhel*, 2 How., 233, *The China*, 7 Wall, 68, *The Siren*, Id. 152, *Sherlock vs. Alling*, 3 Otto, 99) which take it for granted that collision creates a lien against the vessel in fault, the direct point was neither in issue nor decided in any of the cases, and as late as the year 1867 in the *Rock Island Bridge*, 6 Wall, 213, Mr. Justice Field had occasion to consider the English case of *The Volant*, 1 Wm. Rob. 388, in which Dr. Lushington is reported to have said that damage committed on the high seas conferred no lien upon the vessel, and the case of The *Bold Buccleugh*, 7 Moore, P. C. C., 284 holding the contrary view. It is significant that no cases in this country were cited by Mr. Justice Field or counsel; but the right to a lien was based upon the *Bold Buccleugh* as showing that what Dr. Lushington said was a mere dictum, if, indeed, he made use of the expression at all from a contemporaneous report of the same case (1 Notes of Cas. 508.)

The *Bold Buccleugh*, it is apparent, grants the lien upon no other consideration than that the lien and the proceeding *in rem* are correlative—where one exists, the other may be taken, and vice versa, and not otherwise, as will ap-

pear from the following extract from the decision, embodied by Mr. Justice Field in his opinion in the *Rock Island Bridge*, supra.

"A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right, inchoate from the moment the lien attaches, and whilst it must be admitted that when such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, then a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.

The conclusion that a maritime lien exists in every case "where a proceeding *in rem* is the proper course," seems far from satisfactory, for it leaves unanswered the question in what cases a proceeding *in rem* is the proper course. This English case can hardly be claimed as decisive and controlling in face of the maritime codes of nearly all the principal maritime nations denying any lien for collision. (See Appendix.)

Commenting upon the *Bold Buccleugh*, Judge Brown says in the City of Norwalk, supra: "The establishment of a lien in England for collision damages to property, apparently arose through a misinterpretation of the meaning of the ancient practice of the proceeding *in rem*, which as pointed out by President Jenne in *The Dictator* (1892) Prob. Div. 304, did not involve the existence of any lien or privilege on the ship, in the sense in which we now understand it, but was only a means of compelling an appearance, and included a special citation to the master, as in the continental practice. 2 Brown Civil L., 397, The Sloop Merchant, Abb. Adm. 5; Mar. Col. (2 Ed.) 78. Precisely how or when the practice arose of dropping the personal defendant in suits in the English admiralty, is not determinable; but it was during the long controversy between the admiralty and common law courts, and it was probably a mere device of the admiralty courts to avoid the persecution of prohibitions, which were not issued where no personal judgment was asked or rendered. Zouch Adm. 125." 55 Fed. Rep., 111.

According to *Clerke's Praxis*, the oldest authority upon the English Admiralty practice, a book written during the reign of Elizabeth, (of which an entire translation is given in Hall's Adm. Practice, Baltimore 1809)—the original warrant was *in personam* to the marshal to arrest and detain the defendant until he legally appeared (Hall, p. 3.) By Title 28, if the defendant concealed himself or absconded, but had "any goods, merchandise, ship or vessel upon the sea," and within the jurisdiction of the Lord High Admiral, a warrant issued to attach the goods or the ship and cite the defendant and all others having any right or title to the same, to appear and answer unto the libellant. (Hall, p. 60.)

The only instance mentioned in Clerke of a proceeding *in rem* as distinguished from a proceeding *in personam* coupled with an attachment, is in Title 41 entitled "The manner of arresting your own goods when they are detained, occupied or possessed by another" (Hall, p. 81.)

The bitter and protracted conflict between the common law and the admiralty judges in England, in regard to the admiralty jurisdiction, was at least in part due to the admiralty judges, administering a different system of jurisprudence by the same form of proceeding (*in personam*) as in actions at law.

In the resolution of the King's Council, subscribed Febuary 4, 1632, by all the judges of both benches, (Hall's Adm., XXIV), it was agreed that no prohibition should issue in *in personam* suits upon contracts made or other things personal done beyond seas, nor in actions upon charter parties, provided no penalty was demanded and no question existed as to whether the charter party had been made or not, or whether the plaintiff released or otherwise discharged the same within the realm. And in suits for building, amending, saving or necessary victualing of a ship, no prohibition was to issue, provided the suit was "against the ship itself, and not against any party by name, or such as for his interest makes himself a party."

It is notable that in this agreement no mention is made of jurisdiction for damage done by collision, whether in personam or in rem.

This agreement was afterwards disavowed and said to have been renounced by several of the Judges (Hall's Adm., XXVI); but the jurisdiction of the Admiralty Court was again settled, April 12, 1648, as appears from Scobell's Collection of the Acts and Ordinances of the Republican Government of England, anno. 1648, p. 147, by an Act of Parliament, as follows:

"The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise in relation both to the trade of this Kingdom and the commerce with foreign parts through the uncertainty of jurisdiction in the trial of maritime causes, do ordain, and it be ordained by the authority of Parliament:

That the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas, concerning shipping or navigation, or damages happening thereon, or arising at sea in any voyage; and likewise, in all cases of charter parties or contracts for freight, bills of lading, mariners' wages or damages in goods laden on board ship, or other damages done by one ship or vessel to another; or by anchors or want of laying of buoys, except always that the said Court of Admiralty shall not hold pleas, or admit actions upon any bills of exchange or accounts betwixt merchant and merchant or their factors."

This appears to be the first sanction in English law or practice of a suit for collision damages *in rem*, not coupled with proceedings *in personam*, or any citation to a defendant by name.

The earliest reported collision case, in which proceedings were *in rem* is that of *Harbyn vs. Berry*, (The Thomas and John) reported in *Marsden's Admiralty Decisions*, *p.* 235, (1648).

The case appears to have come on to be heard, on the 8th of September, 1648, "*coram venerabilibus viris doctoribus Clerke et Exton Judicibus in Cenaculo Dominorum Advocatorum.*" The Clerke thus mentioned, is presumably Francis Clerke, the author of Clerke's Praxis.

The suit was brought by Thomas Barry and others, owners of the ship *Thomas*, and Nicholas Skinner and others, owners of goods on board, "*contra navem quondam vocatam The John*," and against the goods on board the John, and against "Holditch *et alios pro interesse suo in bonis in navi the John proedicta attachiatis*"—a libel *in rem* and in *personam;* although the novelty of this form of proceeding was apparently such that the entry of the title in the Act Book reads "*Berry, Skinner, et alli, contra Holditch et alios.*"

The antiquity, permanence and universality of the lien of the material man having been firmly established as we have shown, while the question of the damage lien as a settled and determined matter, in our admiralty jurisprudence, depending upon slender and precarious conditions, as we claim, the next inquiry, naturally suggested, is:

VI.

Shall the general maritime law in force among all the commercial nations of the world, except England, govern this Court in determining the comparative rank of the material men's lien and the collision lien?

The precedent is about to be established in this country for the first time; the results, it is conceded, will be far reaching; it cannot be denied that it is desirable that the rule of priority shall be harmonious, if possible, everywhere, in the interest of commerce and of that reciprocity among nations which this country has in recent times been so strongly advocating.

That we have a maritime law of our own has been ably and abundantly vindicated by the learned judges of this Court. (*Insurance Co. vs. Dunham*, 11 Wallace 1, *The Lottowanna*, 21 Id., 558.)

"This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but it is to be interpreted by a more enlarged view of its essential nature and objects, *and with reference to analogous jurisdictions in other countries constituting the maritime commercial world*, as well as to that of England." Bradley, J., in *Ins. Co. vs. Dunham*, supra.

The case last cited, shows the many instances in which this court has declined to follow the narrow and illiberal precedents of the English Courts, born of the constant conflicts between the common law and the admiralty judges, and has declared that the maritime jurisprudence of this country is founded upon the broader and more enlightened principles of the other commercial nations.

In *Delovio vs. Boit*, 2 Gall., 398, which this Court speaking through Mr. Justice Bradley in *Ins. Co. vs. Dunham*, 11 Wallace, 36, has declared "will always stand as a monument of his (Mr. Justice Story's) great erudition," there is probably a more exhaustive exposition of the admiralty and maritime jurisdiction of the United States than is to be found in any other case decided since 1815, when the opinion was penned. This immortal effort of the learned jurist, which repays frequent perusal by every admiralty lawyer seeking for the sources of our maritime law, renders needless the quotation of other authorities. A few extracts from the decision may not be amiss to impress upon this court our view that the English rule of priority of collision creditors which has been followed by the courts below, should not be adopted now.

Mr. Justice Story having examined the maritime regulations of all commercial countries from the remotest antiquity, as well as the jurisdiction of the English admiralty as limited by parliamentary enactments and the restrictions of the common law courts, and having construed the meaning of the words "admiralty" and "maritime" as used in the Constitution delegating to the judicial power cognizance "of all cases of admiralty and maritime jurisdiction," concludes in the following manner:

"The language of the Constitution will, therefore, warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction which commercial convenience, public policy and national rights have contributed to establish, with slight local differences over all Europe; that jurisdiction, which, under the name of Consular Courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combating it with the customs and usages of the sea, produced the venerable Consulato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind. Zouch, ch. 1, p. 87, etc.; Selden ad. Fletam, cap. 8, s. 5; Rob. Collect. Marit., 105 note. Of this great system of maritime law, it may be truly said—'*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebet.*' *Cic. Trag. de Repub., lib. 3 (editio Bost. 1817, tom 17, p. 186.)*" 2 Gall., 398.

We are aware that it will be argued that this court decided in the *Lottawanna*, supra, that the general maritime law is only operative in the United States so far as it is adopted by the laws and usages thereof, and that the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and that the decisions of this court are especially to be considered in determining what are these limits. Under these decisions, Mr. Justice Bradley, in the case cited, declared that the law as settled in this court in the General Smith, 4 Wheaton, 438, fifty years before, adverse to a lien for repairs to a vessel in her home port, must override the general maritime law. The case is, however, no authority whatever on the point involved here, for it is *res nova* in this Court, which is free to decide it unhampered by previous adjudications. Mr. Justice Bradley distinctly recognizes the universality of the general maritime law, as follows:

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case

on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things, wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations, (our own included) of the general maritime law as the basis and ground work of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the facts that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption, it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law, the basis and ground work of their respective maritime systems, the great mass of maritime law, which is thus received by these nations in common, comes to be the common maritime law of the world." 21 Wall, at pp. 572 & 573.

VII.

Liens for materials and supplies take precedence of liens for collision.

The Young America, 30 Fed. Rep., 799
The Amos D. Carver, 35 Id., 665.

As we have already shown, under Point III, the lien for cargo damage, (which according to the decisions of this Court, bears the same relation to the vessel in fault, as liens for negligent towage) is postponed to liens for repairs and supplies, in almost all of the commercial nations of the world.

Liens for collision are not allowed by many of these nations, but where given, their rank is last in the whole order of privileges or liens against vessels.

By the French Code of Commerce, Sec. 191, (See Appendix) repairs are placed in the fifth rank, while liens for cargo damage are in the last rank and no lien for collision is given.

By the recent Italian Code of Commerce, Sec. 675, (See Appe.) necessaries are placed in the ninth rank, while liens for cargo damage are in the last rank, and no lien for collision is given.

By the Belgium Code of Commerce of August 21, 1879, Book 21, Title 1, Article 4, (See Appendix) repairs and supplies are placed in the ninth rank, and collision damage below it, in the next to the last rank.

The Netherland Code of Commerce, Book 2, Sec. 313, (See Appendix) gives supplies and repairs the sixth rank, while cargo damage occupies the lowest rank, and no lien for collision is recognized.

The German Code of Commerce, Book 5, Art, 772, (See Appendix) places repairs and supplies with bottomry in the third rank, while damage to cargo is given the fourth rank, and no lien for collision is provided.

By the Code of Commerce of Spain, Book 3, Title 1,

Art. 580, (See Appendix) repairs and supplies are placed in the eighth rank, while indemnity for goods lost or damaged is given the lowest rank, and lien for collision is not recognized.

The Maritime Law of Norway of July 20, 1893, (See Appendix) prefers bottomry claims to "compensation for damage caused through the fault or negligence of any person employed on board in the service of the ship" which latter, we presume, includes collision, for it is otherwise not mentioned.

The Maritime Law of Sweden of June 12th, 1891, follows in all respects the law of Norway on the subject.

A perusal of these different maritime codes leaves the indelible impression that the underlying principle pervading them all which permits a lien, is some benefit to the vessel charged with it. Indeed the very derivation of our word "lien" from the French "*lien*," "bond" "tie" and the Latin "*ligamen*," denotes a tying together of the claim with the vessel, a meaning entirely opposed to the situation caused by collision, or cargo damage, which manifestly, instead of tying the vessel to the claim created rather produces the opposite condition, namely, to render or tear asunder the vessel by diminishing her value to the extent of the claim.

It will be observed that the law of this country is in entire harmony with these continental regulations so far as they recognize liens or privileges for repairs, supplies, and those other claims which directly benefit or preserve the vessel, in contradistinction to the English rule which denies the lien.

We cannot better conclude our observations under this point than by referring to Desjardins, a Judge of the Court of Cassation, Paris, who, in his monumental work, *Traite de Droit Commercial Maritime*, (Book 1, Sec. 156, p. 291,) in criticizing Emerigon, who complained that the French Code of Commerce should have granted a better rank to the damage claim of the merchant freighters, tersely asks, "*Why should the merchant freighters have a preference! They have neither*

realized or preserved the common pledge." Here is the key to the whole situation.

This fundamental idea has guided this court in according the lien to the material man; and the same reason should incline the court in following these other great commercial countries in their conclusion that this beneficial lien outranks the lien for collision or damage, neither of which preserve or benefit the vessel.

VIII.

The authorities which, it is claimed, give collision and damage liens a rank superior to antecedent repair and supply liens, examined.

The leading case in this country affirming the priority of collision liens (and the decision is carefully confined to these), is the case of the *R. S. Carter*, 40 Fed. Rep., 331, decided by Mr. Justice Blatchford in the Second Circuit, in 1889. The learned Justice, referring to the difference of opinion on the subject between the judges of the two district courts in the circuit, (Judge Benedict, in the Eastern District, *The R. S. Carter*, 38 Fed. Rep., 515, and Judge Brown, in the Southern District in the *Amos D. Carver*, 35 Id., 665,) and the importance of establishing a rule of uniformity in these courts, cites the English and American adjudications up to the time of the decision, on the point in conflict and without examining the question upon principle or irrespective of these authorities, or analyzing the latter, simply concludes that the reasons assigned by Judge Benedict for the priority of the collision lien, seem to him more sound than the opposite views. We dwell especially upon this strange absence of independent expression of this learned admiralty Judge, upon the very important question before him, for the reason that we respectfully, but confidently insist, in the first place, that the authorities presented in his opinion, do not, upon examina-

tion, support his conclusion, and further, that this conclusion is irreconcilable with the rule of priority laid down by him in cases of successive torts, in his previous decision in 1883, in the *Frank J. Fowler*, 21 Blatchf., 470, 17 Fed. Rep., 653.

The two cases first referred to by Mr. Justice Blatchford, *The Pride of the Ocean*, decided by Judge Benedict, in the Eastern District of New York, in June, 1880, 3 Fed. Rep., 162, and the English case of *The Aline*, decided by Dr. Lushington in 1839, 1 W. Rob., 111,—may be considered together as they are based upon the same reasons in preferring a collision lien over a bottomry loan for the same voyage.

In the earlier case of *The Aline*, Dr. Lushington, after giving his opinion that the *mortgagee and the bottomry bondholder* could not take any right greater than the vessel could confer, namely, a lien on her as security against the owner and all who claimed under him, states the principal ground of priority in the following language:

"Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration that he has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not, as he may think most advisable for his own interest. He has an alternative, the suitor in a cause of damage has none."

Upon the ground last stated, Judge Benedict in the Pride of the Ocean, supra, rested the preference of the collision lien, "that a lender of money upon bottomry is a voluntary creditor, who, for the advantage to be derived therefrom, and with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium, while the relation to the ship of him whose demand arises out of a collision is involuntary. It is created by circumstances over which the creditor in damage has no control and he can receive no compensation for the risk." 3 Fed. Rep., 167.

In considering the weight of *The Aline* as an authority, it must be borne in mind that the views above given. of Dr. Lushington were merely *obiter*. The only question presented for decision in that case, was the rank of a collision lien with respect to a bottomry bond for repairs made to the offending vessel *subsequent* to the collision, and it was held that the damage lienor was entitled to the value of the ship prior to the repairs. Judge Brown in the *Young America*, supra., in considering the case said: "In the course of the decision, some observations were made *obiter*, as respects the relation of a prior mortgagee or bottomry bondholder to the owner of another vessel acquiring a lien for a subsequent collision. These remarks are no doubt valuable, as suggestions from so high an authority; but they do not have the weight of an adjudication, since that question was not before the Court. It was not a subject of argument or of review, and has in fact never been adjudicated, so far as I can ascertain, in the English Courts." 30 Fed. Rep., 796.

Grant, however, that the views of Dr. Lushington are pertinent to the point in question, we submit that whatever rank might be accorded to a bottomry holder, or mortgagee, in England (and Dr. Lushington places these upon the same footing) where no lien for repairs or supplies is recognized by law, when opposed by a subsequent damage lien for collision, the current of authority in this country according the beneficial lien of the material man, is contrary to the views of Dr. Lushington, which would thus so easily and completely destroy it.

The fundamental principle of granting of a lien is to give legs and wind to the vessel, to speedily relieve her necessities, so that she may resume her voyage interrupted by need of repairs or supplies in a foreign port consequent upon mishaps or injury. "The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo is *sub modo* subjected to this necessity." *The St. Jago de Cuba*, 9 Wheaton, 416.

The suggestion that the material man exercises an option necessarily involves an examination by him into the capacity and ability of the master and crew to so navigate and manage the vessel repaired or supplied, as not likely

to injure other vessels or persons, or commit the countless acts of negligence which confer a lien upon the offending vessel; the exercise of the option further necessarily implies the ability to ascertain this needed information in a foreign port, where the master and crew are strangers and the opportunities for inquiry are few, if any. Are the necessities of the vessel and the interests of commerce dependent upon them, to wait until in every instance, the material man becomes satisfied to assume the possible risks which the navigation of the vessel may subject his claim to? If it is once held that the material man is in danger of completely losing his claim by torts committed the moment the vessel starts on her voyage, or even while in port immediately after the accruing of the liens, then a condition will arise which may paralyze commerce, for vessels will be unable to obtain needed succor and assistance by the refusal of ship wrights and suppliers to take the enormous risks involved. Such a condition is repellant to the very aim and purpose of the lien; and the situation would be similar to that pictured by Mr. Justice Clifford in the *Kalorama*, supra, in case no repairs or supplies could be furnished upon the credit of a vessel in a foreign port, if her owner were present:

"Were it not so, mariners would refuse to ship for distant ports if the owner was to remain with the ship, either as supercargo or passenger, unless it was known he had credit everywhere, as in case the ship should become disabled and need repairs and provisions, the most reliable means of relief would be withdrawn; and it is not difficult to imagine a case where life and property might be lost, because the owner was on board and without personal credit." 10 Wall, 218.

The lien of the material man is entirely unlike the bottomry holder referred to by Judge Benedict in *The Pride of the Ocean*, supra, who "with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium."

Dr. Lushington expressed the same view in the *Aline*, supra: "In the case of the bottomry creditor, moreover,

the risk that is incurred of losing his security is covered by the amount of premium he is entitled to demand." (1 Wm. Robinson, p. 118, bottom.)

The bottomry holder by the very terms of his contract, loses his claim, if the vessel does not reach her final port of destination, while the material man can follow the vessel to any port to enforce his claim; the bottomry creditor gets a maritime premium for the risk, but we have yet to learn that any Court has allowed recovery for more than the reasonable and market value of repairs or supplies to a vessel upon the theory that the furnisher had a right to make an increased charge for the risk of his claim being lost or extinguished by subsequent claims for torts of the vessel.

In another important aspect, the lien of the material man differs from that of the bottomry holder, when considered with reference to the collision lien. The maritime premium allowed to the bottomry lender for the risk incurred, furnished a fund from which the risk can and almost universally is covered by marine insurance, embracing not only the ordinary perils of the sea but, in modern times, the liability of the vessel for damage to other vessels by collision and otherwise. But the material man cannot conveniently secure himself in this wise owing to the many liens varying in amount, he obtains against different vessels, the uncertainty as to the length of credit, depending not on one voyage, but on several when extensive repairs or supplies are required, and finally and most controlling, that the prices obtained, in competition in open market, do not manifestly include the high premium demanded by underwriters for insurance, which embraces the ordinary perils of the sea, as well as the liability of the vessel repaired or supplied for negligent damage to other vessels.

But, conceding the extreme position of our opponents, that the material man can equally with the bottomry holder insure against the expected casualities, Judge Brown in the *Young America* and *Amos D. Carver*, supra, has clearly demonstrated that the conflict is rarely between the bottomry holder and the damage claimant, but the insurers of both.

"The suggestion that the bottomry lender may cover his risk by the premium exacted seems to me insufficient. He may, indeed, by special contract, insure the vessel, even against a liability for negligent damage to another vessel; but this only puts him, in this respect, on a presumptive equality with the owner of the vessel injured; since all vessels are usually insured against perils of the sea, which include collision by the fault of others. So universal is the practice of maritime insurance that looking for a general rule in the administration of justice, all vessels may be regarded as insured against damage by collision owing to the negligence of others. Practically, therefore, the question is reduced to a question between the bottomry creditor on one vessel and the insurers of the other vessel. In this aspect, the relation of each to the collision is equally voluntary; for the insurer of the ship injured receives his premium constructively, in contemplation of the precise collision that occurs. He has assumed that risk, and been paid for so doing. As between such insurers and the bottomry creditor, or the insurers of the bottomry creditor, who are usually the real parties in interest in the litigation, I see no reason why the bottomry lien should be postponed. The one prior in time being without laches or fault, and not benefited by the subsequent lienor, is entitled to his prior right." *The Young America*, 30 Fed. Rep., at pp. 798 & 799.

"The controversy in the great majority of cases is practically with the insurer, (as it is mainly in this case), who, having in the first instance paid the loss, in effect, out of the fund created by the premiums advanced by all ships insured, seeks to recover indemnity from the offending ship. The insurer does indeed have the benefit of the injured party's lien. But to subordinate prior lienors for wages, bottomry, and supplies to the collision lien would be practically and in effect to treat those lienors as co-proprietors, *pro tanto*, in the offending ship, and responsible for its navigation; or as reinsurers *pro tanto* of the underwriters upon the vessel and cargo insured, a relation as far as possible removed from the equitable relation of the parties. If the lienors may insure, so may the owners of the injured ship and cargo, as they usually do. They stand equal in this respect, and the superior equitable right of the prior contract lienors stands unaffected." *The Amos D. Carver*, 35 Fed. Rep., at pp. 668 & 669.

The next case cited by Mr. Justice Blatchford is the *M. Vandercook*, 24 Fed. Rep., 472, in which, he states, Judge

Nixon, in the District Coart for New Jersey, "held that it was the settled doctrine of the American as well as of the English admiralty, that the claim *ex delicto* should be paid in preference to a claim for prior repairs and supplies." A reference to the report of the decision in the *M. Vandercook*, discloses that the only citations by the court in support of the alleged "settled doctrine" above stated, is an extract from *Abbott on Shipping* and a sentence from the opinion of Mr. Justice Bradley in *Norwich Co. vs. Wright*, 13 Wall, 122, both also reproduced in the opinion of Mr. Justice Blatchford in the Carter case, (40 Fed. Rep., at p. 335 and p. 336,) and hereafter shown not to support the principle to which they are appended.

Mr. Justice Blatchford next refers without comment to the contrary views of Judge Brown in the *Amos D. Carver*, supra, and then reproduces the reasons of Judge Benedict (in the opinion in the case he is reviewing) for postponing the lien of the material man (40 Fed. Rep., at p. 334). These grounds, in brief, are three: First, that the material man for a consideration in the price he charged, voluntarily assumed the risk of a total loss of his lien by the sinking of the ship, and therefore, second, the creation of a lien upon the ship he repaired, arising from a collision, should be held to be included in the risk, and lastly, that the material man who gives time becoms a party to the employment of the vessel in the course of which the accident occurred, since he has a beneficial interest in that employment (40 Fed. Rep., at p. 334).

The ground that the material man includes in the price he charges a consideration for the risk of the total loss of his lien by the sinking of the ship, and therefore, also, the equal risk of being supplanted by a lien for damage by negligent navigation, is so opposed to probability, that we respectfully submit it should be disregarded. Because ships were made to plough the seas and their destiny is ultimately to go down, and all claims alike be lost, is it fair to assume, in the absence of all proof, and contrary to common experience, that shipwrights and furnishers relieving the necessities of the ship, in-

clude in the price charged a consideration for the risk of the total loss of their claims? It is not more likely that the parties comtemplate the reverse of this expectation, for what consideration, however exorbitant it was made, could upon the doctrine of average, cover the risk of total loss? What would be the basis of calculation? Should the enhanced price over the real value of the repairs include sufficient to cover the entire destruction of the ship or her partial injury, or again, the possible great or small damage to other vessels by negligent navigation? Are Courts seeking to declare a fair and equitable rule for the ranking of claims *inter sese*, to wander into these realms of speculation, and declare principles founded upon abstract theories instead of the practical and probable intentions of the persons concerned?

The final ground given by Judge Benedict for postponing the material man, is, as above stated, that by giving time, he becomes a party to the employment of the ship in the course of which the accident occurred, since he has a beneficial interest in that employment. This ground, we submit, is equally as untenable as the others given by the learned Judge.

That the material man, by affording needed repairs upon credit to a vessel in distress, shall thereby be constituted a party to her future employment, implies *ex necessitate*, that he has the right to have voice in that employment, to determine upon what voyage the vessel shall embark, and the likelihood of the master and mariners on board to injure the vessel, or by negligent navigation, do damage to other vessels, imposing a charge upon her. What is the legal relation of the material man to the vessel in this situation? Is he a part owner, or a mortgagee out of possession?

Does he by giving credit, in legal contemplation, become charged with the vessel's employment, sending her out to do possible damage to other vessels and consequently bound by her faults? Surely, if this is law, it is the exact opposite of what shipwrights understand their rights and duties accorded to them in this country from the earliest times.

The extract from *Abbott on Shipping* (11 Ed., 621) is stated by Mr. Justice Blatchford in the Carter case (40 Fed. Rep., 335) as the rule in England, that the maritime lien of damage, originating in the wrong of the master and crew of the vessel in fault, takes precedence of liens *ex contractu*, and absorbs in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage and bottomry. The author cites as authorities in support of the rule, the English case of *The Benares*, 7 Supp. Notes, Cas. Adm. & Ecc., 54, and *The Linda Flor*, Swab., 309, and reported also in 6 Wkly. Rep., 197, both being decisions of Dr. Lushington.

In the same work (Abbott on Shipping, 11 Ed., p. 633,) it is admitted that "*the priority of the lien for damage over liens ex contractu is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them,*" and then follows the statement "but it seems to result from the unqualified terms in which the liability of the owner of the wrong doing vessel to the extent of the value of it, is everywhere laid down."

Judge Choate in the case of *The Orient*, 10 Ben., 620, remarked that the last mentioned statement went far beyond any decided case. Dr. Lushington, in the cases before him, adopted no such rule of preference as a question of mere legal rank, for no question of priority was involved in these cases, but only seamen's wages were postponed solely upon the doctrine of the marshalling of assets, the foreign seamen having two funds, namely, the vessel and the foreign owners who were solvent, while the damage lienor in England was confined to the proceeds of the vessel alone.

Judge Brown in the *Young America* supra, in approving the criticism of his predecessor in the *Orient*, supra, says:

"In a more recent case (1883) the English Court of Appeal has distinctly confirmed the view taken by Judge Choate in respect to the grounds of Dr. Lushington's decisions (*The Elin*, 8 Prob. Div. 39, 129), where, in adhering to Dr. Lushington's rule as respects the wages of sea-

men as against the proceeds of a *foreign ship* held for collision, the Court says:

'It has been argued that these cases have been wrongly decided, because they break through the rule of the Admiralty Court in regard to priorities of maritime liens. But the Linda Flor *was decided on principles quite independent of the rule as to priorities*, which was one well understood by Dr. Lushington, and which in deciding the case I have mentioned, he never intended to break through * * * He did not allow the fund to be diminished, by a payment of wages. "This he did, says the Court, independent of any mere question of priorities" (30 Fed. Rep., at p. 795.)

The cases of *The Linda Flor* and *The Elin* supra, were both instances where the maritime lien arising out of damage done by a *foreign* vessel took precedence of the lien for wages of the foreign seamen on board the vessel at the time of the collision. This priority has not been generally followed in like cases of wages in this country. *The Orient*, 10 Ben., 620, *The Samuel J. Christian*, 16 Fed. Rep., 797, *The Daisy Day*, 40 Id., 538.

The quotation from *Mach. Shipp.* (2 Ed.) 653, appearing in the Carter case (40 Fed. Rep. at p. 336) cites as the only authority the *Benares*, supra, in which, no question of priority was involved. There the only point was whether under the English statute of limited liability requiring the owner to bring into Court the "value of the ship and the freight," the statute meant gross freight, or whether the owner could deduct therefrom seamen's wages, etc. Dr. Lushington construed the statute as forbidding any such deduction (7 Supp. Notes, Cases 54.)

The only other citation given by Mr. Justice Blatchford in the Carter case is a sentence from the opinion of Mr. Justice Bradley in *Norwich Co. vs. Wright*, 13 Wall, 122, that "Liens for reparation for wrong done, are superior to any prior liens for money borrowed, wages, pilotage, etc."

Upon consulting the report of the case, it appears that this sentence is followed by the words, "But they stand on an equality with regard to each other if they arise from the same cause," with a reference to *Maclachlan on Shipp.*, 598.

But upon a further perusal of what immediately follows, in the opinion, it is shown clearly by these words of Mr. Justice Bradley: "We think therefore, that the lien of the libellants for the loss of the schooner and her cargo, arising from the collision *is on an equality* with the lien for the loss of the cargo of the steamer from the same cause"—that the learned Justice employed the reference to *Maclachlan on Shipping* solely to enforce the conclusion that the two liens in the case before him of the owners of a schooner and cargo sunk, in collision with a steamer, which also sank, and the lien of the cargo owner on the latter, *stood on an equality*. No question of priority was involved in the case, or necessary to its decision, and it is only by a most strained construction that the fragment reproduced in the Carter case can be held to reflect the opinion of this Court or Mr. Justice Bradley. The extract referred to, has been held to be a mere dictum in the *Samuel J. Christian*, 16 Fed. Rep., 797, by Judge Benedict, and in the *Young America*, 30 Id., 794, by Judge Brown.

Having thus disclosed by an examination of the authorities cited by Mr. Justice Blatchford, in the Carter case, the absence of a single case in point, determining as a matter of legal rank the priority of the collision lien over the antecedent lien for materials or supplies, it remains but to notice the case of *F. J. Fowler* decided by the learned Justice in 1883, (17 Fed. Rep., 653,) which we submit is inconsistent with his later decision in the R. S. Carter, although he distinguishes the same in the latter case.

Mr. Justice Blatchford, in the Fowler case, reversed the decision of the District Court, reported in 8 Fed. Rep., 331.

There, the competing claims, as appears from the statement of facts prefacing the opinion in the Circuit Court, (17 Fed. Rep., at p. 656,) were for *quasi* torts of the same character, each being for damages caused by the negligence of a tug towards her tow. There was an interval of nineteen days between the accruing of the earlier and the later claims. (See opinion in the District Court, 8 Fed. Rep., at p. 332.)

Judge Choate, in the Court below, in postponing the earlier lien, distinctly held that the delay of nineteen days in enforcing the claim could not be regarded as laches under the authorities, but based his decision upon the conclusion that a "lien or tacit hypothecation" is vested in the earlier damage claimant, and he is "to that extent in the position of an owner,—he has a *quasi* proprietary interest in the vessel. It is true he cannot, as an owner, control her employment or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself, and in some cases the second injury may be done before he has an opportunity to arrest her."

In support of this conclusion, Judge Choate, cited the English cases of *The Aline*, 1 Wm. Rob., 111, and the *Bold Buccleugh*, 7 Moore, P. C., 284, quoting the extract from the *Aline*, which we have also reproduced (p. 34) and the following comment of the Court in the *Bold Buccleugh*, upon the *Aline*:

"In that case there was a bottomry bond before and after the collision, and the Court held that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.

(It may be noted, parenthetically, that the Privy Counsel fell in error in its conclusion as to what was held in *The Aline*, as in that case, there was *no bottomry bond before the collision*, but only one for repairs made *after* the collision, as a careful perusal of the case will disclose.)

The principle of these two cases Judge Choate held was also applicable to a prior lienholder, "who, by the tort of the master and mariners, has become, so to speak, a part owner in the vessel" (Id. at p. 339,) and who "clearly took the chances of her incurring new liabilities, according to

the principles of maritime law, and in a sense, may be said to have consented to her being employed in another towage service, out of which they (he) must be held to have understood that such a claim for damage might grow" (Id. at p. 340).

In reversing the decree which awarded the preference to the latest lien, upon the grounds and the strength of the two English cases before mentioned, Mr. Justice Blatchford gave his reasons for preferring the elder lienor in the remarks which we have incorporated in pages 7 and 8 of this brief, and concluded (17 Fed. Rep., 656):

"There is no principle of the maritime law, *and no interest of commerce or navigation, which requires that the elder lienor not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor."*

We contend that the very same reasons advanced by Judge Choate in the District Court in the Fowler case, postponing the earlier lien of damage, are now urged by our opponent to postpone the prior lien of the material men, and the situation and the circumstances of this case, and the Fowler case are alike in this repect.

It is upon this analogy that the District Court of the Southern district held the Fowler case *stare decisis* in the *Young America* 30 Fed. Rep., 789, 798, and awarded to the earlier supply lien a priority over the later damage lien. See also *The Amos D. Carver*, 35 Id., 665, *The Gratitude*, 42 Id., 299.

It is true that Judge Blatchford in the Carter case (p. 335,) seeks to distinguish the Fowler case as one in which both claims were of the same character, each arising out of negligence on the part of a tug in fulfilling a contract of towage, but with all due respect to his views, we have after long reflection been unable to understand the distinction.

If a lien is a *jus in re* giving an interest in the vessel, as we have sought to show, then it seems to us that every consideration which gives the earlier lien for damage, a priority applies with greater force to an earlier lien for re-

pairs and supplies. The later lien for damage is of no benefit to the prior liens, for it does not increase the value of the vessel, while the policy of the maritime law has ever been to afford a vessel a ready means to supply her needs for the coming voyage by giving the material man security by a lien on the ship. If these liens are to be subject to every claim for damage arising during the voyage, the furnisher will surely refuse to give his goods to fit out the ship, and the entire system of credit to vessels for materials and supplies will be uprooted with the result that if vessels can get their fittings and equipment for the voyage only by paying cash, they will rot by the wharves.

The situation cannot be better summed up than in the words of Judge Brown, who speaks thus of these damage claims.

> If liens for all these causes are held to out-rank, as a matter of law, liens for seamen's wages, bottomry and necessary supplies previously furnished for the same voyage, it will constitute a revolution in the ranking of liens as hitherto understood, and as practiced by all maritime nations, and it will often result practically in sweeping away entirely those liens which have hitherto been deemed most meritorious, and essential to the protection of commerce." (30 Fed. Rep., at pp. 794 and 795.)

IX.

The question certified by the Circuit Court of Appeals should be answered in the negative.

J. H. LICHLITER,
Proctor for Appellee.

MARK ASH,
Of Counsel.

APPENDIX.

Containing extracts from the maritime codes of the principal continental countries on the subject of the rank of maritime liens.

I.

French Code of Commerce,*

(Passed September 10th, 1807.)

Book II.—Title I.

"*Article 190.*—Ships and other vessels are personal property.

Nevertheless, they are liable for the debts of the vendor, and especially for those which the law declares to be privileged.

Article 191.—Privileged debts are the following, and are classed in the following order:

1st. Judicial costs and other charges incurred in obtaining a sale of the vessel, and in the distribution of the proceeds thereof.

2nd. The charge for pilotage, tonnage, anchorage, lashing, basin or outer basin.

3rd. The wages of the keeper, and the expenses of watching the vessel from the time of her entrance into port till the sale.

4th. The storage of her rigging, and appurtenances.

5th. The expenses of repairing the vessel, rigging and appurtenances, since her entrance into port from her last voyage.

6th. The wages and pay of the captain and crew employed in the last voyage.

7th. The sums advanced to the captain for the necessary

* From the translation of Leopold Goirand, 1880, London: Stevens & Sons.

expenses of the vessel during the last voyage, and the reimbursement of the price of the goods sold by him for the same purpose.

8th. The sums due to the vendor, tradesmen, and workmen employed in the building of the vessel, if she has not yet made a voyage, and those due to creditors for provisions, work, labour, and for refitting, victualling, outfit and equipment, before the departure of the vessel, if she has already made a voyage.

9th. The sums lent on bottomry, for repairing, victualling, outfit and equipment, before the departure of the vessel. (Repealed by the Law of 10th Dec., 1874.)

10th. The amount of the premiums of insurance effected on the hull, rigging, appurtenances, outfit and equipment of the vessel for her last voyage.

11th. The indemnity due to the freighters for not delivering the goods laden on board, or for the damage which the goods may have sustained through the fault of the captain or crew.

The creditors comprised in each Section of this Article, shall have a concurrent lien on the vessel for the amount of their demands; and in case of insufficiency, the price of the vessel shall be divided equally among them in proportion to the amount due to each. Parties having claims guaranteed by mortgage upon the ship, shall be paid in the order of registration of such mortgages, but not before payment of those claims which the law declares by this same Article to be privileged debts.

II.

The Code of Commerce of Italy,

Approved in 1882.

BOOK II, TITLE IX, CHAP. IV.

674. Vessels and shares therein are bound even in the hands of third parties for the payment of debts which the

law declares privileged in the manner and within the limits established hereafter.

675. The following are privileged on vessels and are placed on the proceeds thereof, in the rank in which they are described in this section :

1st. Costs in proceedings taken in Court in the common interest of creditors for provisional remedies or execution on the vessel.

2nd. The expenses, the indemnities and the awards for salvage due during the last voyage according to the provisions of the mercantile marine courts.

3rd. The navigation taxes established by law.

4th. The dues to pilot, the dues to watchman and the expenses for watching the vessel after entering into port.

5th. The rent for stores of deposit of the apparel and tackle of the vessel.

6th. The expense for the keeping of the vessel and of its tackle and apparel after its last voyage and entry into port.

7th. The salaries, the emuloments and the indemnities due, according to the provisions of title 3rd of this book to the master and the other persons of the crew for the last voyage, as well as the dues to the Homes for Invalids of the Mercantile Marine for the same voyage.

8th. The amounts due for contribution and general average.

9th. The amounts due for capital and interest on obligations contracted by the master for the necessaries of the vessel in the cases referred to in Sec. 509 and in accordance with the formalities prescribed therein.

10th. The premiums of insurance on the vessel and of its accessories for the last voyage whether the vessel is insured by the voyage or for a stated period, and for steamers running at certain periods and insured at a stated period, the premium corresponding to the last six months; moreover in mutual insurance associations, the partitions or contributions for the last six months.

11th. The indemnity due to charterer for omission to deliver the goods shipped, or for damage done to the same

through the fault of the master or of the crew during the last voyage.

12th. The purchase price of the vessel still due to the vendor.

13th. The claims described No. 9, transcribed and recorded late; every other claim on the vessel given by bottomry and the claims for which the vessel shall have given pledge.

In case of several claims ranking together and mentioned in No. 13, the preference is determined by the date of the transcription of the title and of the record on the ship's paper.

III.

The Code of Commerce of Belgium.

Law of August 21, 1879.

Book II, Liber I, Maritime Commerce.

Article 4. Are preferred (granted to a privilege) in the order in which they are ranked, the hereinafter described claims:

1st. The judicial costs and others necessary to make the sale and the distribution of proceeds.

2d. The duties of navigation established in conformity with the law and the towage expenses.

3rd. The salary of the watchman and of the watching of the vessel from her entry in port to the day of sale.

4th. The rent for the stores where the riggings and apparatus are deposited.

5th. The expenses of preservation of the vessel and of her rigging and apparatus, since her entry into port.

6th. The expenses and indemnities due on the occasion of the salvage or the maritime assistance for the last voyage.

7th. The rents and salaries of the captain and the crew

employed since the opening of the last roll of the crew whatever be the mode of remuneration of their services.

8th. The sum loaned to the captain for the needs of the vessel during the last voyage, and the reimbursement of the price of goods sold for the same purpose.

9th. The sums due to the creditors for supplies, operations, labor for refitting, victuals, equipment and fitting, prior to the departure of the vessel if she has already navigated.

10th. The sums due to the suppliers and workingmen employed in the building, if the vessel has not yet made any voyage.

When the suppliers and workingmen have known that the building of the vessel had been contracted by a contractor for a third party, the privilege exists only so far as the latter is debtor to the contractor, at the time when the action is brought.

11th. The sum advanced for the building of a vessel by the one for whom the vessel is built, if the vessel is not yet delivered to him.

12th. The amount of premium of insurance effected upon the hull, the keel, the rigging, tackle, fitting and equipment due for the last voyage when the insurance is contracted in the course of the voyage, or for the last year when the insurance is made per year.

13th. The damages due to the charterer or freighter for default in delivery of the goods they have loaded, or for reimbursement of the average suffered by the said goods by the fault of the captain or crew.

14th. The damages due for cause of collision.

15th. The sums due to the vendor of the vessel for his price.

The creditors comprised in each of the numbers of the present article are to participate on the same footing *pro rata* in case of insufficiency of the proceeds.

IV.

The Code of the Netherlands.*

BOOK II.

Rights and Obligations Resulting From Navigation.

TITLE I. VESSELS.

Article 313. The preferred claims which in the case of the preceding Article, may be recovered upon the proceeds of sale of the vessel, are determined as follows:

They are privileged in the following order:

1st. The salaries of assistance, salvage and pilotage.

2d. The duties of tonnage, lighthouse, signals, quarantine, and other port expenses.

3d. The salary of the watchmen and other necessary workingmen for the custody of the vessel.

4th. The rent of the stores for the deposit of the rigging and equipments.

5th. The salary of the captain and crew.

6th. The supply of sails, cords and other necessary articles, and the expenses of repairs and preservation of the vessel and of her rigging and equipment.

The sums advanced or loaned to the captain or paid for his account, for the service and the needs of the vessel, as well as the sums due in indemnity of the goods sold by him to pay the above mentioned debts and the bottomry loans for paying off these debts wholly or in part, including the premium of the bottomry loan.

All the debts mentioned in Nos. 1, 2, 5 and 6 are privileged in so far only as they have been made on account of the last voyage, to wit:

Those mentioned in Nos. 1 and 2 and in the last paragraph of No. 6, if they were made during the last voyage.

Those mentioned in No. 5 and in the first paragraph of

*Translated from the Edition in French of Gustave Tripels. 1886. Paris: Arthur Rousseau.

No. 6 if they were made since the day when the vessel was ready and able to make the voyage, until the day when the voyage was considered as terminated.

The voyage is reputed terminated twenty-one days after the arrival of the vessel at destination unless the merchandise and effects are unloaded sooner.

The debts named in Nos. 3 and 4 enjoy the preference if made since the vessel came into port until the day of her sale.

7th. The expense of the necessary repairs of the vessel and her apparatus other than those above mentioned under No. 6, during the three last years, from the day when the repairs were completed.

8th. The claim for the building of the vessel and interest due for the three last years.

9th The sums loaned as bottomry loans upon the hull and keel of the vessel and her apparatus, for the victuals, fitting out and equipment, and for which the contract was executed previous to the departure of the vessel, excepting the premium on the bottomry loan.

10th. The damages due to the freightors or charterers for default in delivering the merchandise or for reimbursement of the average sustained by the said merchandise by the fault or dishonesty of the captain or the crew.

V.

German Code of Commerce.

Book 5, Title 10.*

Art. 772. The claims which concern the same voyage, as well as those which are considered as concerning the same voyage (Art. 771,) are to be liquidated in the following order:

*Book 5 treats of the navigation legislation of the German Empire.

1. The public ship, navigation and port charges (Art. 757, par. 3.)

2. The claims of the crew arising out of contracts of service and hire (Art. 757, par. 5.)

3. Pilotage, as well as salvage, claims for assistance, redemption and costs of restitution, (Art. 757, par. 5,); the contributions of the vessel for general average (Art. 757, par. 6,); claims arising out of bottomry, and similar transactions upon credit, contracted by the master in cases of necessity, as well as the other demands which are considered of equal standing, (Art. 757, par. 7.)

4. Claims for non-delivery of, or damage to merchandise and traveller's effects.

5. Claims mentioned in Art. 757, par. 9 and 10.

The claims which in the above article are placed in the third rank on an equality with bottomry, etc., are according to Art. 757, par. 7 as follows:

Art. 757, par. 7. The claims of bottomry creditors, to whom the ship is bound, as well as other claims arising from transactions upon credit, contracted by the master, as such, in cases of necessity, while the vessel is in a place other than her home port (Art. 497-510,) even though the master is part, or sole owner of the vessel, these claims arising out of such transactions upon credit—are of equal rank to claims for anything delivered or labor furnished, without the granting of credit, to the master of the vessel, as such, in a place other than her home port, in cases of necessity, for the preservation of the vessel, or the completion of the voyage, as far as these things delivered and labor furnished, are necessary to relieve the wants of the vessel.

The claims which in the above article 772, are placed in the lowest rank, comprise, according to Art. 757, par. 9 and 10, other contractual liens of the master and owner, and debts of the crew. No mention is made of collision.

VI.

The Maritime Law of Norway.

of July 20, 1893.

Chapter II. Maritime liens and the extinction of Maritime Claims.

§ 267. A claim for which a creditor, according to the rules of this chapter has a maritime lien (maritime claim) shall be privileged to satisfaction out of the proceeds of the thing on which the lien attaches after the public dues chargeable thereon, but before all other claims.

§ 268. A maritime lien upon the ship and the freight shall attach to the following claims:

1. Pilotage, salvage and expenses incurred in rescuing a ship from enemies.

2. The claims of the master and the crew for wages and other remuneration to which they are lawfully entitled for service on board the ship.

3. Claims for contribution to general average and expenses to be apportioned according to similar rules (§ 161, 2d par. and § 218, 2d par.) bottomry claims, and the claims of the owners of the cargo for goods sold during the voyage for the requirements of the ship.

4. Claims arising from obligations undertaken by the master in his capacity as such, or from non-fulfillment of contracts concluded by the owners of the ship, personally, or by deputy, and which it was the duty of the master to fulfill (see § 7); claims for compensation for damage caused through the fault or negligence of any person employed on board in the service of the ship (see § 8), and the claims of the master for money paid out, or undertaken to be paid by him, for the purpose of covering the expenses of the ship.

A maritime lien upon the ship shall also include the apparel of the ship, but not provisions, fuel, coal or other engineer's stores. A maritime lien upon the freight shall attach to the gross freight for the voyage upon which the

claim originated. A maritime lien for a bottomry claim shall attach to the ship or the freight, or both, according to the wording of the bottomry bond. See § 175.

§ 269. The claims enumerated under a maritime lien enumerated in § 266, shall be satisfied in the serial succession in which they are therein named, provided all of them have arisen under the same voyage. Claims coming under a like number shall all have equal rights, but, however, in such manner that when claims under Nos. 1 and 3, have not originated from one and the same case of emergency, the later claim shall take precedence of the earlier one.

If the several claims date from different voyages, the claims arising from a later voyage shall take precedence of those arising from an earlier voyage; but the master and crew shall retain their preferential claims on the ship for so much of the wages due to them under the last agreement as may amount to pay for, at most, the last 12 months even if during that time the ship has made several voyages.

VII.

Code of Commerce of Spain,

Passed August 22, 1885.

BOOK III. TITLE I

Art. 580. In all judicial sales of a vessel for payment of creditors, they rank in the order enumerated:

1. Credits in favor of the public treasury, which are proven by the official certificate of the proper authority.

2. The judicial costs of the proceeding, as taxed and approved by the judge or Court.

3. Pilotage, tonnage, sea and other port charges, proven

by sufficient certificates of the officials in charge of the collection of these claims.

4. The wages of the keepers and watchmen of the ship, and any other expense incurred in her preservation, since her arrival in port and until the sale, which may have been paid or be due, according to verified claim approved by the Judge or Court.

5. The expense of the warehouse in which the apparel and appurtenances of the ship have been stored, according to agreement.

6. The wages of the master and crew on the last voyage, proven by liquidation, from the ship's roll and books, and approved by the chief of the branch of the merchant marine where the vessel may be, and if there is no such official at the place, by the Consul, Judge or Court.

7. The reimbursement of the value of the cargo sold by the master to repair the ship, provided, however, that the sale has been ordered by a judicial decree according to the formalities required in such cases, and noted on the certificate of the ship.

8. The unpaid purchase money due the last vendor of the ship, and credits due for material and labor used in the construction of the ship before her first voyage, and those proceeding from repairs and equipment of the ship, and from provisions and coal, on the last voyage.

To entitle the credits under this subdivision to preference, the contract for the same must appear to be recorded in the Mercantile Register, unless the credits were incurred while the ship was on a voyage and had not returned to her port of registry, in which event they are to be recorded with all the formalities required in such cases, and also noted in the certificate of the ship.

9. The sums advanced upon the hull and keel of the ship, and her apparel and appurtenances, before her departure, justified by the contracts executed according to law, and recorded in the Mercantile Register; and also the sums advanced during the voyage for the credits enumerated in the last subdivision, provided the same are recorded

and noted as required by said subdivision; and the premiums of insurance according to the policy, or certificate from the books of the underwriter.

10. The indemnity due the freighters for the value of the goods shipped, which have not been delivered to the consignees, or for damages suffered for which the vessel is responsible, provided the claims are recorded in the sentence of the judge or arbitrator.

Article 581.—If the proceeds of the sale are insufficient to pay the creditors comprised in the same number or rank, the sum remaining shall be divided among these creditors, *pro rata*.

The question certified by the Circuit Court of Appeals, should be answered in the negative.

No. 25.

Brief of Kirlin for Appellees.

Filed Jan. 26, 1897.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U.
FILED.
JAN 26 1897
JAMES H. McKENNEY,
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OCTOBER TERM, 1896

No. 175

THE JOHN G. STEVENS, her Engines, &c., EDWARD H LOUD et al., Owners of THE C. R. FLINT
Intervenors and Appellants

against

FREDERICK H. GLADWISH and others
Libelants and Appellees

On Certificate from the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE APPELLEES

J. PARKER KIRLIN
Of Counsel

SUPREME COURT OF THE UNITED STATES.

October Term, 1896. No. 175.

The "JOHN G. STEVENS," her engines, &c., Edward H. Loud and others, owners of the "C. R. FLINT,"
Intervenors and Appellants,

vs.

FREDERICK H. GLADWISH and others,
Libelants and Appellees.

BRIEF FOR APPELLEES.

The cause comes before this Court on a certificate from the Circuit Court of Appeals, for the Second Circuit.

Certificate.

A decree adjudging that the libelants and appellees, Gladwish *et al.*, recover against the said steamtug *John G. Stevens* the amount reported due to them by the Commissioner, with interest and costs, amounting in all to two hundred and eighteen dollars and seven cents ($218.07), and further adjudging that the lien of the appellees is a superior lien and entitled to priority over the lien of the appellants, Edward H. Loud *et al.*, and that the balance of the proceeds of the sale of said steamtug be paid out of the registry to said appellees, having

been made in the District Court of the United States for the Eastern District of New York, and an appeal having been taken therefrom to this Court by the above named Edward H. Loud *et al.*, and the cause having come for on final hearing, a certain question of law arose, concerning which this Court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose are as follows:

1. That the home port of the tug is New York.

2. That between December 7, 1885, and March 9, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of lien therefor under the laws of the State of New York, Chap. 482 of Laws of 1862, thereby creating statutory liens on her.

3. That on March 8, 1886, the tug *J. G. Stevens* was employed in the port of New York to tow the schooner *C. R. Flint* through the waters of said port, and while towing negligently allowed the *Flint* to collide with the bark *Doris Eckhoff* in tow of the tug *R. S. Carter*.

4. On March 16, 1896, Loud *et al.*, owners of the *Flint*, libelled the *Stevens* and the *Carter* in admiralty, in the District Court of the United States for the Eastern District of New York, for the collision damage.

5. On March 16, 1896, Gladwish, *et al.*, libelled the *Stevens* in the same Court, to enforce their supply lien under the State law.

6. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000

7. The Gladwish libel resulted in a decree condemning the *Stevens* for the coal supplied and costs, in all $218.07.

8. The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the *Stevens*, leaving the Loud decree unsatisfied.

Upon these facts this Court desires instruction upon the question of law for the proper decision of said cause, namely:

Is the lien for the damages occasioned by negligent towage which arose on March 8, 1886, to be preferred to the previous State lien for supplies, the libel for supplies being filed last?

Statement.

The appellants, owners of the schooner *Flint*, engaged the tug *Stevens* to tow her. The tug negligently ran the schooner into another vessel, and the appellants have procured a judgment for the damages for $15,606.15. To enable the tug to enter upon this towage service and other towage services, the respondents supplied the tug with necessary coal, for which the respondents obtained judgment *in rem* against the tug, amounting to $218.07. The State statute gives a lien for this and other similar contract liens, which it declares shall be "superior to all other liens, except seamen's wages," *i. e.*, superior to mere damage claims. This preference, with slight exceptions, is in accord with the general maritime law.

The appellants contend that the English-American law as to the rank of contract liens is opposite to the rank given by general maritime law and by the State statute; and that liens *ex delicto*, among which this tow's lien, as a *quasi tort*, may be classed, *override all contract liens*. We maintain the contrary.

The Question Certified.

The question propounded is essentially the broad question above stated; for it is conceded that a lien for negligent damage to a *tow* in executing a contract of towage, is of the same rank as a lien for *damage to cargo* on board the offending ship (Mr. Justice BRADLEY, in the *Alabama and Gamecock*, 92 U. S., 697; Mr. Justice CLIFFORD, in *Sturges* vs. *Boyer*, 24 How., 122; Mr. Justice MATTHEWS in the *J. P. Donaldson*, 21 Fed., 680; the *Columbia*, 44 U. S. App., 326). And it is also now settled that a statutory lien for supplies has the same status as a maritime lien (The *J. E. Rumbell*, 148 U. S., 1).

The question is, therefore, practically, this:

DOES THE LIEN FOR CARGO-DAMAGE OVERRIDE THE LIEN FOR WAGES AND NECESSARY SUPPLIES ON THE SAME SHIP?

We say, "wages *and* supplies," (1) because the recent American cases embrace both; (2) because the arguments for the priority of the damage claim apply, for the most part, to both alike, and (3) because the English cases, from which the mistaken inferences have been drawn, and which have been the *chief source* of error, were all *wages cases*; so that if the appellant's contention fails as against wages, it must fail as against supplies.

Upon the question certified the decisions in the lower courts are conflicting, with the preponderance of authority holding that the lien for supplies outranks that for damage arising from negligent towage. The *Samuel J. Christian*, 16 Fed. Rep., 797; The *Young America*, 30 Fed. Rep., 789; The *J. G. Stevens*, 58 Fed. Rep., 792; and an intimation by Mr. Justice BLATCHFORD in his decision in The *R. S. Carter*, 40 Fed. Rep., 331.

The opposed cases are The *M. Vandercook*, 24 Fed. Rep., 472; The *Daisy Day*, 40 Fed. Rep., 538.

It has also been held by Judge CHOATE, in The *Orient*, 10 Benedict, 620; by Judge BENEDICT, in The *Samuel J. Christian*, 16 Fed. Rep., 797, and by Judge SEVERENS, in The *Daisy Day*, 40 Fed. Rep., 538, that the lien for wages should be preferred to a claim of damage from negligent towage.

Upon the cognate question of the rank of the lien for pure tort and liens *ex contractu* it has been held by Judge BROWN, in the Southern District of New York, that the contract lien for supplies should be preferred (The *Amos D. Carver*, 35 Fed. Rep., 665);

The contrary decisions are those of Mr. Justice BLATCHFORD, in The *R. S. Carter*, 40 Fed. Rep., 331, that the collision claim arising from pure tort should be preferred to the lien for supplies; those of The *F. H. Stanwood* (Court of Appeals, 7th Circuit), 49 Fed. Rep., 577, of Judge NIXON, in the *Maria and Elizabeth*, 12 Fed. Rep., 627, and of Judge SWAN,

in The *Nettie Woodward*, 50 Fed., 224, holding that the damage lien has priority over seamen's wages.

In this brief the following contentions will be maintained:

(1) That the case of *Norwich* vs. *Wright* (13 Wall., 104), contains no adjudication as to the comparative rank of a supply or wages claim, and a damage claim. It merely adjudged that the *two classes of damage claims* then before the Court, viz., one a *quasi tort*, for the negligence of the steamer in carrying her own cargo and, the other, a claim in *pure tort*, for sinking the schooner *Van Vliet* and her cargo, were on an equality. Both claims were *ex delicto*. This Court is not in the least committed to the errors of Maclachlan in the passage which was quoted from him for the use of that part of the passage only which was correct.

(2) That the precise case here presented has not been decided in England. It could not arise there, for the English law gives *no lien* for ordinary supplies, and *no lien* for *cargo* damaged on the offending ship; and in towage contracts the tow is regarded as *principal*. This whole case is outside the pale of the English law.

(3) That by the universal maritime law, contract liens are preferred to liens *ex delicto*. The *Consulado* establishes no certain preference, except that in favor of seamen, which outranked all other claims. This alone destroys the appellants' whole theory. Beyond that the law of liens was not then matured. The inferior rank of damage claims was, however, fully established prior to the French ordinance of 1681, which at once became the accepted law of all Europe, and is the parent of all subsequent continental codes. Nowhere has that order of rank since been disturbed.

(4) That contract liens are preferred, because based upon the *necessities* of the ship, and upon the *credit given* to the ship; this preference is also required by humanity and public policy, which demand that the comparatively small claims of seamen, workmen and materialmen should be preferred to the larger and non-beneficial claims of ship and cargo in general commercial dealings, which are *otherwise secured by insurance*. The former *need protection*, and rightly rely upon it; the latter do not.

(5) That the long standing maritime law of the commercial world is a part of the law of this country; and upon all unsettled points it is an authoritative standard and guide in purely maritime questions like the present, except where that law is discordant with our time and its needs. The subject of maritime liens was adopted into our law from continental and not from English sources; the restrictions of the English law did not apply to the colonies; reference should therefore be made to the general usage and practice of maritime nations in fixing their rank.

(6) The rank accorded to the different maritime liens in this country, has, in the main, followed the universal maritime law as embodied in the French Marine Ordinance of 1681.

(7) The confusion in the American cases is of recent growth. It has arisen from the false generalizations and statements of some recent English text writers, saying that "liens *ex delicto* are superior to liens for wages, supplies, &c." No such adjudication is found in the English law. These false generalizations are based upon a few misapprehended decisions of Dr. Lushington in connection with the *Limited Liability* Act, and *marshaling securities*, in respect to *foreign vessels*, in which cases Dr. Lushington remitted the seamen to their *personal remedy* against the foreign owner, as against the

English creditor, who had no such remedy; this was done *without reference* to the *normal rank* of the wages lien, and presupposed its normal superiority. The wages of seamen have always enjoyed a paramount lien both in English and American maritime law.

The arguments in favor of a reversal of the marine rule contain nothing new; they were unanimously overruled ages ago.

(8) That the present case presents the question of the *normal rank* of the two liens, unembarrassed by any special circumstances connected with the limitation of liability, or the marshaling of different securities held by the opposing lienors. Both creditors here have precisely the same remedies.

(9) The contention that the whole ship, including seamen's and materialmen's interest as lienors, is devoted to the payment of damage liens, is simply begging the question. From the dawn of the maritime law this has been otherwise; as is shown by the fact that the *seamen's* lien has always been preferred to damage claims.

(10) The fact that the ship is the *instrument* of the damage is not the reason nor the basis of the damage lien. This theory breaks down at the first test, viz., where the damage is done by the *towed* ship, but through the tug's fault, and in which case the ship that inflicted the damage is not liable; the ship's liability is not determined by a *figure of speech*, but by the rule of principal and agent.

(11) That the policy and the maxims of the maritime law, preferring the minor claims of seamen and claims for necessary supplies, as against the broader damage claims of the owners of ship and cargo, are substantially re-enacted in numerous State statutes, including that of New York; and while these statutes do not of themselves bind the maritime courts, they

do declare, in the most authoritative form, the adaptedness of the maritime law, as above expressed, to the needs of our time and people, and call upon the Court not to forsake, but to enforce, the true marine law.

(12) The practical results of reversing the established order of privileges would be unfavorable to commerce.

POINTS.

I.

The relative rank of the damage lien, as compared with the liens for wages and supplies, was not adjudged in *Norwich* v. *Wright*.

(1.) The confusion in some of the cases in the lower courts has largely resulted from the *dictum* of Mr. Justice BRADLEY in the case of *Norwich* v. *Wright*, 13 Wall., 104, 122. The appellants' argument proceeds largely upon the theory that the question certified has in effect been adjudged by that case. In their brief (p. 15) it is said:

"This Court, in the *City of Norwich*, has expressly *decided* that the lien of cargo on the delinquent carrying steamer was entitled to equal rank with the lien of cargo on the libeling schooner, and in doing so expressly *held that contract liens were postponed*. Instead, therefore, of this ruling of Mr. Justice BRADLEY being a dictum, as is sometimes urged, it was *essential to the decision*, and is decisive against any such postponement of *quasi* torts."

This is a clear error, as will readily be perceived by an examination of the case.

The points before the Court are stated in Mr. Justice BRADLEY'S own words as follows:

"About half-past three o'clock in the morning of the 18th of April, 1866, a collision occurred between

the schooner *General Van Vliet* and the steamer *City of Norwich*, on Long Island Sound, off Stamford, Connecticut. Both vessels were seriously injured and sunk. * * * The *libel* in the case was filed *by the owners of the schooner and her cargo* against the owners of the steamer *in personam*. The District Court made a *decree in favor of the libelants* for $19,975 *for the schooner*, and $1,921.63 for *her cargo*, with interest from the date of the collision. The Circuit Court affirmed this decree. The *respondents, by way of defense* not only denied that the steamer was in fault, but claimed the benifit of the Act of Congress, passed March 3, 1851, limiting the liability of shipowners to the amount or value of their interest in the ship (*City of Norwich*) and her freight, *They alleged in their answer that the steamer at the time of the collision had on board a large and valuable cargo belonging to various parties*—much larger in value than the whole amount of the interest of the defendants in said steamer and the freight then pending, *and that the whole was lost.* And before the decree was passed, the *respondents filed a petition wherein they alleged that proceedings in rem had been commenced* in behalf of said parties against the steamer, in the District Court of the United States for the Eastern District of New York, *for the recovery of damages for the loss of said cargo.* They, therefore, prayed that they might be permitted to show, by proper evidence, the whole amount of *damages sustained by all of said parties, including the present libelants*, and the value of said steamer and her freight then pending, and that the decree of the Court might be so framed as to give the libelants such part or proportion of the amount of the damages sustained by them, as the value of steamer and freight bore to the whole amount of *damages* sustained by all parties to the collision."

There is no intimation in the pleadings in the case prosecuted *in personam*, nor in the allegations of the answer thereto, nor in the petition for a limitation of liability, of any outstanding liens for either wages or supplies; and Mr. Justice BRADLEY did not state any such question for decision.

The Court then proceeded to consider the merits. On that branch of the case the decree of the Circuit

Court was affirmed. Next it considered whether the petitioners were entitled to the benefits of the limitation of liability Act of 1851; it found that the libelants were entitled to such limitation, and on that branch of the case reversed the decree below.

The further question then arose whether a case for the application of the statute was presented by reason of the total claims being in excess of the value of the *City of Norwich*, after the collision, and her freight for the voyage.

Upon this branch of the case, the opinion of Mr. Justice BRADLEY (p. 122), proceeds:

"But the claim of the libelants alone is not alleged to be greater than the value of the steamer and her freight. The libelants, therefore, would be entitled to receive the whole amount of this damage if they were the only persons *who sustained damage*, or if, by reason of the nature of their claim, their lien was *superior to that of the owners of the cargo lost on the steamer*. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause (Macl. Ship., 598). We think, *therefore*, that *the lien of the libelants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer from the same cause*. This being so, the case for the application of the statute arises; for it is alleged by the libelants that *the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo*, greatly exceeds the value of the steamer and her freight for the voyage."

(2.) This analysis of the case shows that the only liens whose rank was involved in the decision were (*a*) the lien of the libelants, owners of the schooner *Van Vliet;* (*b*) the lien of the owners of cargo on board the schooner; (*c*) the lien of the owners of cargo on board the *City of Norwich*. The two first liens were for *pure torts;* the last, for *a quasi tort*. The adjudication was, that these two classes of liens

were of equal rank. Nothing more was decided. The question in the present case was ~~untried~~ untouched

(3.) The point as to wages and supplies could not well have been before the Court, because, under the Act of 1851, limitation of liability could only be obtained by a surrender of the offending *res* or her value free of prior contract encumbrances. That Act only gave the right of limitation of liabilities arising from torts or accidents, without the design, neglect, privity, or knowledge of the owner. It did not release him from liabilities *ex contractu*. Exemption from contract liabilities came only with the Act of 1884.

(4.) Although the *decision* of the Court does not aid the appellants, they, nevertheless, rely upon the extra-judicial remark of Mr. Justice BRADLEY that:

"Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, &c. But they stand on an equality with regard to each other if they arise from the same cause (Macl. Ship., 598)."

These sentences, as the reference shows, were quoted and condensed from the first edition of Maclachlan on Shipping, page 598. It is evident that the two were taken for the use of the second, which states that "they [liens for reparation of wrong done] stand on an equality with regard to each other, if they arise from the same cause"; for this was the only point before the Court. The first sentence was of itself unimportant, and was evidently inserted as merely introductory to the second, without any critical consideration. The passage referred to by Mr. Justice BRADLEY, from the first edition of Maclachlan, page 598, is as follows:

"Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They

are severally co-extensive in point of right, with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision, the claim to rank equally and share *pro rata* in the common fund (17 & 18 Vict., C. 104, Sec. 514; 23 & 24 Vict., C. 126, Sec. 35; *Dobree* v. *Schroder*, 2 My. & Cr., 489; *Hill* v. *Audus*, 24 L. J. (Ch.), 229; *Leycester* v. *Logan*, 26 L. J. (Ch.), 306). * * *

"Such liens in virtue of positive law rank against ship and freight in derogation of any rights of ownership, or rights by mortgage or beneficial lien existing at the time of the collision. They acquire thereby *priority* over mortgages, prior bottomry, wages, pilotage, towage and salvage, and subsist adversely to proprietary interests and claims (see 17 & 18 Vict., C. 104, Secs. 504, 505; The *Benares*, 7 Notes of Cases Supp., 50, 54)."

Transposing the order of Maclachlan's sentences, and setting the parts used opposite the paraphase of them, it will be seen that the passage in the opinion of the Court is a substantial quotation and condensation of Maclachlan's words, and need not, therefore, be necessarily taken as Mr. Justice BRADLEY'S individual judgment in regard to the rank of classes of liens not then before the Court.

OPINION.	MACLACHLIN.
Liens for reparation for wrong done are superior to any prior lien for money borrowed, wages, pilotage, &c. But they stand on an equality with regard to each other, if they arise from the same cause.	Liens in the nature of reparation for wrong done * * * acquire * * * priority over mortgages, prior bottomry, wages, pilotage, towage and salvage. * * * They are severally co-extensive in point of right * * * They furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share *pro rata* in the common fund.

That this passage, in Maclachlan, so far as it relates to the priority of damage claims over the other liens mentioned, is not only incorrect, but is not supported by the English cases, is shown under Point II.

II.

The precise case here presented has not been decided in England.

(1.) It could not arise there for the English law gives no lien for ordinary supplies (The *Heinrich Bjorn*, 11 App. Cas., 270); no lien for cargo damaged on the offending ship (The *Victoria*, 12 P. D., 105), and in towage contracts, the tow is regarded as principal (The *Ticonderoga*, Swab., 215; The *Sinquasi*, 5 P. D., 241; The *America*, L. R., 6 P. C., 127; The *Niobe* [1891], A. C., 401).

(2.) The misapprehension of the English rule as to the rank of damage claims and liens for wages is chiefly due to incorrect statements of the decisions in the later editions of *Abbott* and *Maclachlan*.

The rule as stated in *Abbott on Shipping*, 11th Ed., p. 621 (quoted by Mr. Justice BLATCHFORD, in the *John G. Stevens*, 40 Fed. Rep., 331, 335), is as follows:

"The maritime lien of damage, originating in the wrong of the master and crew of the vessel in fault, and founded on considerations of public policy for the prevention of careless navigation, takes precedence within the limits which the law assigns to the indemnification of the injured party, even though anterior in date, of liens *ex contractu*. It absorbs, in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage and bottomry, leaving them to be enforced by proceedings against the persons of the owners. Were it otherwise, the owners to whom the damage is imputed would be indemnified at the expense of the injured party; the wrongdoer at the cost of him to whom the wrong has been done."

The cases upon the authority of which the law is thus stated, are The *Benares*, 7 Notes of Cas. Supp.; 50, 54; The *Linda Flor*, Swab., 309; The *Elin*, 8 P. D., 39; The *Chimera*, Ship. & Merc. Gaz., Nov. 27,

1852; The *Duna*, 5 Law Times Rep., N. S., 217; 1 Mar. Law. Cas., O. S., 159; The *Elin* (on appeal), L. R., 8 P. D., 129. The appellants also refer to the *Aline*, 1 W. Rob., 111, 118, as authority to the same effect.

The only point actually involved in the *Aline* (*supra*) related to the rank of claims for collision damage and *subsequent* bottomry (*Abb. Ship.*, 13th Ed., 874). The remarks in Dr. LUSHINGTON'S opinion, relative to prior bottomry are *dicta* only; and no subsequent case has arisen in England in which the priority, as between collision damage and prior bottomry, has been decided.

All of the other cases relate to damage claims and wages.

The leading case is The *Benares*, 5 Notes of Cas. Supp., 50. The owners sought to limit their liability under the statute of 53 & 54 Vic. III., which required surrender of the "value of the ship *and freight*." The question was really nothing more than the construction of the word "freight" and the intent of the statute. The inquiry was whether the bail should bring into court the "gross amounts of freight on the homeward voyage at £2,538 12s.9d., or whether the owners could discharge themselves by bringing in the net freight after making the following deductions for disbursements which they had paid, namely: commissions, £25 7s. 6d.; wages, £554 10s.; dockage, pilotage, towage and other similar charges, £85 14s. 6d. This would have left a net freight of £1,883 0s. 8d. The point came before the Court on a motion to decree a monition against the bail to bring in the gross freight.

Dr. LUSHINGTON, in the course of his judgment (at p. 53), said:

"In all the cases cited one must bear in mind whether or not the owners of the ship which had done the damage were or were not *solvent* persons; because questions of exceedingly great difficulty might arise, which I do not mean to anticipate, except by

saying that, as questions of towage, wages and salvage may all be mixed up in bankruptcy cases, *I do not mean to bind myself by any observations I am going to make on any of these complicated questions.*"

Continuing (at p. 54) he said:

"In this court it has always been held that the mariner has a lien on the freight. This being so, let us consider what the words of the statute are: 'The value of his or their ship or vessel and the freight due or to grow due for and during the voyage.' There is nothing said as to how we are to ascertain the value of the ship or the amount of the freight or whether any deductions shall take place or not. I apprehend it is quite clear that no deductions can be made on account of the ship, for bottomry, mortgage, pilotage or towage or any other demands. Then why should such deduction take place on account of freight? Why should it be said that the one is the gross freight and the other is the net? Why the wages of the crew, anchorage, boat hire, pilotage and towage should be more chargeable against the freight than against the ship I confess I am at a loss to understand."

Bearing in mind the question which was before the Court, it is obvious that Dr. LUSHINGTON did not mean to deal with the priorities, in a case of *competing liens* put forward by those who had earned wages, pilotage, towage, &c.; but decided only that an owner having paid and extinguished the liens could not deduct the amount of them from the freight, but must bring the gross freight into the limitation proceeding. The same practice in effect has existed in the Second Circuit under our Act of 1851 (Rev. St., § 4284) requiring *superior liens* to be paid off before surrender. (The Ada, 300 Fed. 499)

Under a statute providing for a release of the owner from personal responsibility upon certain *prescribed terms*, those terms must be complied with; they do not affect the *rank* of privileged claims.

(3) The superior claims of seamen and the explanation of the English cases was so clearly and so justly set

forth by CHOATE, *J.*, in 1879, in the case of The *Orient*, 10 Ben., 620, that we quote from his opinion *in extenso*. In that case the petitioners having a claim in tort for damage to another vessel, contended that their claim was superior to that of the seamen of the vessel in fault, citing the English text books and decisions of Dr. LUSHINGTON. Upon this point, Judge CHOATE observed as follows:

"Several foreign decisions are cited to sustain this claim. The first is the case of The *Benares*, 7 Notes of Cases Suppl., 50. * * * There was no claim of seamen here competing with the claim of the party injured by the collision, but simply a claim of the owners who had paid wages to deduct them from the freight which had been attached. The question which would be the superior lien did not arise in the case and the opinion of Dr. LUSHINGTON seems not to touch that question. There is not even a dictum in the case adverse to the seamen's lien for wages in such a case, as I understand the decision.

"The case of The *Linda Flor*, Swabey, 309, is the only other reported English case cited. It was a suit for mariner's wages against a Portuguese ship, and the claim was opposed by a party who had obtained a decree against the vessel in a cause of damage, the proceeds being insufficient to meet all the claims. Dr. LUSHINGTON held that in such a case, there being no evidence that the foreign owners were insolvent, the injured party who had obtained a decree should be paid out of the fund in preference to the seaman. He applied to the case the equitable doctrine which governs cases of marshaling assets between competing claimants, that a party who has two funds to resort to shall, as against a party having only one of those funds to resort to, be remitted to the fund to which the other party cannot resort. And as the seamen could resort to the personal liability of the owners in their own country, which was assumed by the Court to afford no practical remedy of any actual value to the other claimant, they should be compelled to do so; that in such a case to permit the seamen to reduce the only fund to which the injured party could resort would be merely to benefit the owners and relieve them from a part of the liability which the law imposed on them for the injury inflicted by them. I think this is the point of the decision. The learned Judge

indeed adds that 'it is not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew.' I do not understand the decision to rest in any considerable degree on this last suggestion. On the contrary, this seems to be thrown in merely as a suggestion, showing that in many cases no real injustice will probably be done by the application to a case like that before the court of the equitable doctrine of marshaling assets. The case is by no means an authority that, upon the sole ground of punishment for misconduct or retaliation, the seamen of the offending ship forfeit any of the rights which the maritime law gives them against their own vessel for their wages. Nor is this case an authority for the position that English seamen would, as against English parties suing in an English court for damage by collision, be remitted to their personal remedy against their English owners. The principle of marshaling assets would seem not to go so far. The important fact assumed by the Court as existing, that the party injured would stand no chance of obtaining redress in a foreign court for any balance due to him of the owner's liability, would not exist in such a case. It could not be assumed that in an English court the party injured would not receive full justice against the owners equally with the seamen, and in such a case that would not be subjected to the expense, delay and uncertainty of a resort to a foreign tribunal, perhaps in a half-civilized country, whose law might be wholly inadequate for their relief. Dr. LUSHINGTON says, in that case, 'in case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of redress save by proceeding against the ship herself, which I apprehend is one of the most cogent reasons for all our proceedings *in rem*.'

"The only other English case cited is The *Chimaera*, unreported, but stated in The *Linda Flor* to be precisely like that case. It must be assumed, therefore, that it was the case of foreign seamen competing with English parties who had a claim for damages by collision.

"The case of The *Duna*, 13 Ir. Jurist., was the case of a Russian ship proceeded against in the Irish Admiralty Court. It was like the case of The *Linda Flor* and is decided on the authority of that case. In the case of The *Enterprise*, 1 Lowell, 455, the same

rule was applied as against British seamen, on the ground that the law of Great Britain controlled the case. And Judge LOWELL there says: 'I believe no admiralty court of the United States has decided the general question of the order of priority of these liens.'

"The equitable doctrine of marshaling assets undoubtedly prevails in admiralty courts and will be applied where its application will do no injustice. Thus even in a case of seamen's wages where there are two funds to which they can resort, as the ship and the freight, each equally available and equally certain, they may for the benefit of other parties having only a claim on the ship, be decreed to be paid out of the freight' (The *Sailor Prince*, 1 Ben., 466). Perhaps the application of this doctrine as made in the cases of The *Linda Flor* and The *Dona* would, as against foreign seamen, be held in this country a reasonable application of that doctrine, although it remits the seamen to a remedy far less certain and expeditious than their remedy against the ship.

"But whether the same rule would obtain here it is unnecessary to inquire, because, as it seems to me, the principle of those cases, so far as it is a principle of the marshaling of assets, does not apply to the present case. This steam-tug was registered in New Jersey. Her owner lives in the District of New Jersey. It cannot be said that the injured party will be practically without redress there. Throughout the United States the courts are open to him as freely and with equal chance of justice as to the seamen. New York and New Jersey do not stand in this respect in relation to each other as did England and Portugal, or Ireland and Russia. In the case of foreign seamen the question how far a court of admiralty shall take jurisdiction of their suit for wages, is a matter of discretion, and this being so the Court is bound to look in the exercise of that discretion to the rights and interests of all other parties; and this might justify these English decisions as the rule to be applied here in the case of a foreign ship presenting the like equitable considerations for remitting the seamen to their home tribunals.

"The later editions of *Abbott on Shipping* give some countenance to the idea that these English cases have established the rule independently of the nationality of the ship, that a lien for damage by

collision takes precedence of the lien for wages, on 'considerations of public policy to prevent careless navigation' (*Abbott on Shipping*, 11th Ed., p. 621). As no other authority is cited for this proposition than the cases above referred to, I think the point cannot be deemed established by authority. Indeed, in the same work (p. 633), it is admitted that 'the priority of the lien for damage over liens *ex contractu* is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them.' The learned author then adds, 'but it seems to result from the unqualified terms in which the liability of the owner of the wrong-doing vessel to the extent of the value of it, is everywhere laid down.' With deference to the great authority of Lord TENTERDEN on a question of this character, I think it must be said that these *dicta* go far beyond any decided case.

"*And I fail to see how the rule of the maritime law, limiting the liability of shipowners* and especially how the statutory limitation of that liability in England and the United States, *affects the question.* The primary and apparently the only purpose of these statutes was to limit the liability of owners and *not to impair the rights of any other party;* and if, in consequence of other claims against the ship or freight, the injured party cannot get satisfaction out of the primary fund, that is, the ship and freight, to the extent of the statutory limit, or the owner cannot, by reason of such other claim and incumbrance thereon, surrender the thing against which the injured party has a remedy *in rem* in such condition as to satisfy that limited liability, I see no reason why, in cases of domestic ships, at least, the injured party should not, for the unsatisfied balance, be remitted to his personal remedy against the owner. Against this *dictum* I set the authority of the same author in the earlier editions of his work on shipping (4th Amer. fr. 5th Lond. Ed., p. 484): 'In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges, for the same reason that the last bottomry bond is preferred to those of an earlier date. The labor of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which other-

wise they could not have had.' This doctrine seems to be well supported by authority and to be applicable as well to claims for collision as to other claims, unless this policy of retaliation or retribution for the wrong done by the ship is also a rule of the maritime law.

"That doctrine seems to me inconsistent with the uniform policy declared by courts of admiralty in respect to seamen's wages, and to have no foundation. It is true that for misconduct towards their own ship seamen are punished by the forfeiture or diminution of wages in some cases, but both in England and the United States this species of punishment is carefully regulated by statute and strictly guarded against abuse, and these regulations have never extended to any case of misconduct except towards the seamen's own ship and her officers. To hold all the seamen of the offending ship liable to punishment by a partial or entire forfeiture of their rights would be a wholesale condemnation of innocent and guilty alike, and not in accordance with the probable facts of the case or with natural justice; and I see no such equity of the injured party and no such controlling policy to prevent careless navigation as to require this. Depriving seamen of their lien and remitting them to their personal action is a partial deprivation of their rights. It is in the nature of a forfeiture or punishment. The remedy to which they would be remitted is neither so certain nor so expeditious, and the rule contended for, if applied, does seriously impair the rights of seamen not shown to be personally guilty of any wrong."

(4.) The foregoing explanation by Judge CHOATE that Dr. LUSHINGTON's decisions were not based upon the relative rank of the liens in question, and was no adjudication as regards their rank, was fully sustained four years afterwards (in 1883) by the English Court of Appeals in the case of The *Elin*, 8 Prob. Div., 39, 129, wherein foreign seamen claimed that their wages should be taken from the proceeds of a foreign ship held for a claim in collision in behalf of English creditors. Referring to Dr. LUSHINGTON'S rule in such cases, BRETT, Master of the Rolls, says:

"It has been argued that these cases have been wrongly decided, because they break through the rule of the admiralty court in regard to priorities of maritime liens. But The *Linda Flor* was *decided on principles quite independent of the rule as to priorities*, which was one well understood by Dr. LUSHINGTON, and which, indeciding the case I have mentioned, *he never intended to break through.* * * * Payment of wages out of the fund was disallowed *independent of any mere question of privilege.*"

In The *Young America*, BROWN, *J.*, after referring to these explanations of the English cases, observes:

"Whether in connection with the law or the statutes that limit the liability of shipowners for the torts of the ship, a court of admiralty should, in the exercise of its equitable powers, remit seamen to their personal remedy against the master and owner, must depend upon the circumstances of each case, and upon quite different principles from those that determine the mere rank of liens. In England the rule has never been applied to her own seamen, nor to her own ships; but only to cases of foreign ships having responsible owners. It can have no application to domestic vessels, in our own forum, where the personal responsibility of the owners is equally available to both classes of lienors, except in the case of bankrupt owners; and in that case there is no superior equity in mere damage liens as such."

(5.) In *Abbott on Shipping* (13th Ed., 876) the author makes this comment:

"Where claims of wages and salvage are mixed up by the bankruptcy or insolvency of the shipowner, by whose vessel damage has been done, it would appear that no certain rule has been adopted for its guidance by the Court of Admiralty * * * (p 873). *There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner or some similar cause, have no other remedy for the recovery of what is due to them.*"

This in effect surrenders the whole case, since that situation alone presents the true test.

That the lien of seamen for their wages has always in English law been held to be of a sacred and indelible character is shown under Point III.

III.

By the universal maritime law, including that of this country and England, contract liens are superior in rank to liens *ex delicto*.

The contrary doctrine now for the first time urged upon this Court is absolutely without any solid foundation in the maritime law.

1. This is shown beyond the shadow of doubt by the status of *seamen's wages*, which from the very beginning were declared to be preferred to all other claims.

In the *Consulado* mariners are given a privilege over the claim for cargo sold for money to advance the voyage (3 *Black Book Adm.*, 163-164); over the claim for cargo lost (*Ibid.*, p. 85); over the claim for cargo damaged by bad stowage or negligence (*Ibid.*, p. 93), and over the merchant freighter's lien for damage to cargo from towing a derelict (*Ibid.*, p. 464). The claim for the wages extended to the ship (if by trick the freight proved to be insufficient to pay them) even in the hands of purchasers (*Ibid.*, p. 199); and their lien attached to the ship, even when let out for a lump sum (*Ibid.*, p. 261). The claim of seamen for wages on a voyage is preferred to that of builders, outfitters and materialmen in the Amalphitan Table (4 *Black Book Adm.*, 45, 47).

2. In the *Consulado* there is no distinction between privileges, except for seamen's wages, which are always placed first. Beyond that, no preferences are clearly indicated, though the "ship pays the whole."

The passages cited by the appellants conclusively demolish their theory of the superiority of liens *ex delicto;* and as respects claims other than seamen's wages, they are ambiguous at best. The appellants have not called the attention of the Court to any passage relating especially to collision damage. Since the relation of tow to tug is analogous to that of cargo to carrying vessel, they refer to the provisions relating to cargo damage. Chapter 18 (3 *Black Book Adm.*, 82) provides that for such damage arising from negligence the "*managing owner* ought to make compensation for all the loss which the merchants may incur from their goods becoming damp, as far as the means of the managing owner suffice; and *if they do not suffice, the ship ought to be sold* without the part owners or the creditors having any preference, *saving always the mariners, who are not to lose their wages.*" But in Chapter 61 (3 *Black Book Adm.*, p. 163) it is provided that if the ship is in a place where the managing owner has need of ship's apparel or necessaries, the merchant ought to lend it to him, and all the part owners who shall be in the ship and any "earlier lenders" ought to be bound to the said merchants. In Chapter 62 (*Ibid.*) it is provided that if the managing owner of the ship has need of money and cannot find it, and is in a desert place, and if the merchants have no money, they ought to sell some of their goods to refit the vessel, and no preceding lender nor part owner can say or object that the said merchants shall be paid, saving always the wages of the mariners. Chapter 194 (3 *Black Book Adm.*, 387) provides that the lender may cause the ship to be sold, and requires that any surplus remaining from the sale shall be paid over to the other part owners.

No provision is made for a case where the merchant freighters and "lenders" both have claims, and the proceeds of the sale are insufficient to pay both.

In the sloop *Merchant*, Abbott's Adm., 1, 5,

BETTS, *J.*, referring to the provisions of the *Consulado* on this subject, said:

"In the subsequent chapters, in which provision is made for the sale of vessels to satisfy what are now regarded as maritime liens, it is at best equivocal whether the sales were not made by force of executions on judgment or decrees first obtained in personal suits, and not by the direct condemnation of the vessels or merchandise. So Clerke in his admiralty practice does not * * * merely treat first of proceedings *in personam*, but he views the process against vessels and property by warrant of arrest or sequestration as auxiliary only to the suit *in personam* and employed to constrain the appearance of the real party to be charged (tit. 28, *and Oughton's Notes*), and this was clearly so by the civil law. *Wood's Civ. L.*, B. 4, C. 3, Sec. 2."

So far, therefore, as the provisions of the *Consulado* indicate anything, it is merely that the claims, other than wages, stand without preference. The maritime law was still formative and not fully developed on these points.

(3.) During the centuries that succeded and long prior to the *Marine Ordonnance of Louis XIV.*, in 1681, the marine law had become much more matured and definite. This ordonnance embodied the previous maritime law of Europe, and positively defined the following *four classes of privileged claims* to be paid out of the proceeds of the sale of vessels (*Lib.* I., Tit XIV, Sec. 16; 1 *Valin*, p. 42; 1 *Valroger Dr. Mar.*, p. 91).

"Les loyers des matelots employés au dernier voyage seront payés par préférence à tous créanciers; aprés eux, les opposans pour deniers prêtés pour les nécessités du navire pendant le voyage; ensuite, ceux qui auront prêté pour radoub, victuailles et équipment avant le depart; en quatrième lieu, les marchands chargeurs, le tout par concurrence entre les créanciers étant en même degré de privilége. Et quant aux créanciers chirographaires et autres non privi-

légiés, ils seront payés suivant les lois et coutumes des lieux où l'adjudication aura été faite."

This section may be translated as follows:

"(1) The wages of seamen employed on the last voyage shall be paid in preference to all other creditors; (2) after them, those who lent money for the necessities of the ship during the voyage; (3) next, those who have made loans for refitting, provisioning or equipping the ship before her departure; and (4) the merchant freighters; always concurrently among creditors having the same degree of privilege. (5) And as for the specialty creditors and others who are not privileged, they shall be paid according to the laws and customs of the places where the adjudication has been made."

The ordonnance further provides as follows:

"Ship owners shall be responsible for the acts of the master; but they will be discharged therefrom upon abandonment of the ship and freight" (*Lib.* II., Tit. VIII., Art. 2; see 1 *Valroger Dr. M.*, p. 276).

In the language of the *Consulado:* "The ship pays the whole" (The *Rebecca*, 1 Ware, at p. 196).

(4.) The ship on surrender, being thus devoted to the payment of *all liabilities* growing out of the voyage, a *general lien* seems implied for all claims in the fifth class, as against any other debts of the owner (The *Rebecca*, 1 Ware, 198, 199). This included all liabilities in contract or in tort that were not embraced in the preceding four "*privileges.*" They fell under the fifth division, and included damages by collision, which, though a general lien in the above sense, had no *privilege* over other general creditors of the ship. By surrender the owner was exonerated from all liability, except for seamen's wages, and those debts which he had personally incurred or had made his own (see *Oakey* vs. *Fort*, 44 Fed., 364).

The above article of the Ordinance of 1681 made no provision for the payment of judicial expenses, nor for salvage. These have been generally inserted in later codes. The omission, however, never

caused embarrassment; for neither expenses nor salvage were within the scope of that chapter of the Ordinance, which was the distribution of the *proceeds* among *creditors*, on the seizure and sale of the ship. The judicial and other expenses were not *debts*, but the means of converting the ship into money for distribution. *Salvage* is not strictly a *debt*. It cannot be sued for at common law; it is a *reward*, adjudged by the law or by the Court, for the rescue of property abandoned or endangered, and it was in part otherwise provided for by the Ordinance (see 1 *Valroger*, p. 165). Salvors, moreover, being usually in *possession* of the property, were secured by other provisions of the law. The Ordinance was dealing with *non-possessory liens*.

The four main classes of privileges, as laid down as above in the Ordinance of 1681, have never been departed from by any commercial nation. Subsequent codes have enlarged the specific provisions; but not one has ever departed from the *order* of *privileged claims* there laid down. That is the law of the whole commercial world to this hour. Nowhere is any damage lien privileged above wages and supplies.

(5.) The superiority of the Marine Ordonnance of 1681 for its terseness and precision caused it to be speedily accepted throughout Europe as the embodiment and best expression of the pre-existing law. Its authority as a true exposition of the customary maritime law prevailing at that time, is unquestionable.

In *Norwich* v. *Wright*, 13 Wall., 104, 120, Mr. Justice BRADLEY referred to "the *maritime law as codified* in the celebrated Ordonnance de la Marine in 1681"; in the *Scotland*, 105 U. S., 24, 28, he again referred to "the text of the French ordinance, which is *regarded as merely formulating the old customary law*"; and in the *Main*, 152 U. S., 122, 123, Mr. Justice BROWN spoke of "the French ordinance of 1681, which has served as a model for most

of the modern maritime codes." Judge PETERS, in his introduction to a partial translation of the ordinance (2 Peters Adm., Appendix 1), said:

In the case of *Morgan & Price* v. *Insurance Company of North America*, decided by the Supreme Court of this State in January, 1807, Chief Justice TILGHMAN, having referred to one of the articles of these ordinances, thus expressed himself: 'They and the commentaries on them have been received with great respect in the courts both of England and the United States, *not as conveying any authority in themselves, but as evidence of the general marine law*. When they are contradicted by judicial decisions in our own country they are not to be regarded; but on points which have not been decided they are worthy of great consideration.'"

In The *Rebecca*, 1 Ware, 188, 193, WARE, *J.*, referred to the authority of the ordinance, and to the section in which the rank of existing privileges was stated as follows:

"The principle of reciprocal liens, of the cargo on the vessel, and the vessel on the cargo, is established by the *Ordonnance de la Marine*, *L.* 1, *T.* 14, *Art.* 16; *Liv.* 3, *Tit.* 3, *Art.* 24; and is preserved in the *Code de Commerce*, 191, n. 11,307. But this was not the introduction of any new and peculiar principle into the maritime code of France. It was merely sanctioning, by a formal act of legislation, what had existed as customary law from time immemorial, and so it is considered and treated by the commentators on the ordonnance and code (1 *Valin*, 363, 629, 666).

"Emerigon, in commenting on L. 1, *Tit.* 14, Art. 16, *Saisie des raissaux*, which contains an enumeration of certain privileged credits, including the one now under consideration, says that the article (No. 16) *neither creates any new privilege, nor takes away any that existed before*" (*Contracts a la Grosse*, *Ch.* 12, *Sect.* 4).

(6.) Of the criticisms of Emerigon on the rank of these privileges (to which the appellants call attention), that the lien of the merchant freighter should be placed before that of the seamen, who may be

responsible for the damages, and before that of the materialmen, because the shippers were ignorant of the supplies and loans which may have been made in the place of outfit, WARE, *J.* (*ibid*, 193, 194), said:

"Whatever may be thought of Emerigon's criticism of the arrangement of privileges by the ordonnance, there can be no doubt that he considered the lien in question as existing, *independently of it, by the general maritime law*. *Boulay-Paty*, the most approved commentator on the maritime part of the Code de Commerce, in his remarks on this article, says: 'This rule is very ancient in the usages and customs of the sea' (*Cours de Droit Maritime*, *Vol.* 2, 297." (*a*)

(7.) Although additional privileges have been established in most of the continental codes to meet the growing needs of commerce, the privileges mentioned in the Ordonnance of 1681 are retained in all, and their *relative rank* to each other has *never been disturbed*. Translations of a number of these codes are appended to Mr. Ash's brief for the appellees.

In the French Code of 1807, class 1 of the ordinance is ranked sixth; class 2, seventh; class 3, eighth; class 4, eleventh (Mr. Ash's Brief, pp. 47, 48).

In the Italian Code of 1882, class 1 of the ordinance is ranked seventh; classes 2 and 3, ninth; class 4, eleventh (*Ibid*, p. 49).

In the Belgian Code, class 1 of the ordinance is ranked seventh; class 2, eighth; class 3, ninth; class 4, thirteenth (*Ibid*, pp. 50, 51).

In the Code of the Netherlands, class 1 of the ordinance is ranked fifth; class 2, sixth; class 3, seventh and ninth; class 4, tenth (*Ibid*, pp. 52, 53).

In the German Code of Commerce, class 1 of the ordinance is ranked second; classes 2 and 3 (with others), third; class 4, fourth (*Ibid*, p. 54).

In the Maritime Code of Norway, July 20, 1893, class 1 of the ordinance is ranked second; classes 2

(*a*) The criticisms of Emerigon are answered in 1 *Valroger, Dr. Mar.*, pp. 157, 158; 1 *Desjardin, Dr. Com. Mar.*, 290, 291.

and 3 (with others, see also Section 269), third and fourth; class 4, fourth (*Ibid*, pp. 55, 56).

In the Code of Commerce of Spain, class 1 of the ordinance is ranked sixth; class 2, eighth; class 3, ninth; class 4, tenth (*Ibid*, pp. 57, 58).

(8.) In view of the persistency with which the four classes of express privileges mentioned in the ordinance have maintained their relative rank in the law and practice of the maritime countries of Europe for over two centuries, the question in appellants' brief, "But are these codes, enacted since "1808, any authority here?" and the answer it assumes to give appear quite pointless. While doubtless the foreign code ranking of maritime privileges is not to be received as conveying any authority in itself, it is most persuasive as evidence of the general maritime law upon that subject. It also shows that the classification of priorities in the great ordinance has been found adequate and satisfactory to the ever-advancing needs of commerce, from its infancy down to the present time; and as the arguments for ranking the collision claim first are not new, but have always existed, the universal rule of the maritime law which placed it last, affords a most decisive answer to the contention that it should now be placed first.

An express privilege for collision damage is given in comparatively few of the modern codes, but wherever found it is placed last in the whole order of privileges (The *Young America*, 30 Fed. Rep., p. 791).

The right to limit liability by surrendering ship and freight exists throughout the maritime world; and doubtless, when no express privilege is given, the collision creditor in the continental practice is generally paid with other non privileged maritime creditors of the ship out of the surplus, and proceeds, if any, after the payment of the privileged creditors, but before the shipowner's general creditors. This was the case under the ordonnance of 1681.

THE ENGLISH LAW.

(9.) In England, although the precise point here involved has never been decided (see Point II.), the contract lien of the seaman for his wages has been repeatedly held, in the broadest terms, to have a preference over the claims of any other creditor.

In the case of The *Madonna d'Idra* (1811), 1 Dodson, 37, 40, Sir WILLIAM SCOTT, than whom there is no higher English authority in maritime law, referring to seamen's wages, says:

"These are sacred liens, and as long as a plank remains the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted." The same was repeated by him in the case of The *Sidney Cove*, 2 Dodson, 11 (1815).

Lord TENTERDEN, perhaps the next highest English authority, in the last edition of his work that was published during his lifetime, says:

"In proceedings against the ship in specie, if the value thereof be insufficient to discharge all claims upon it, the seaman's claim for his wages is preferred *before all other charges*." *Abb. Ship.*, 5th London Ed., 484.

The contrary statements in later editions are the mistaken additions of later editors.

In The *Neptune*, 1 Hagg. Adm., 227, 239, Lord STOWELL again said:

"Upon all these grounds, on the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, upon the understanding of the law, which has generally, though silently, prevailed, I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case, not exactly upon this question, "that a seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them."

In *Brown's Civil and Admiralty Law* (Vol. 2, p. 187) it is said of seamen's wages: "The ship, in fact,

is pledged to them *in preference to any other creditor.*"

In the case of The *Hersey* (1837), 3 Hagg., 404, 407, Sir JOHN NICOLL, referring to bottomry, says:

"The master is not to hypothecate without necessity, for the hypothecation may be unjust, not only as it affects the property of his owners, but by giving a priority of payment to one creditor, and thereby operating to the injury of other creditors, and of mortgagees; for *if the hypothecation be valid*, it has a *preference to all other liens, except seamen's wages.*"

Similar citations might be multiplied almost indefinitely.

AMERICAN LAW.

(10.) The American authorities are to the same effect. In The *Charles Carter* (1808), 4 Cranch, 328, this Court, in reference to a bottomry bond, say:

"There is a strong reason to contend that this claim or privilege shall be *preferred to every other* for the voyage on which the bottomry is founded, *except seamen's wages.*"

In *Sheppard* v. *Taylor*, 5 Peters, 675, Mr. Justice STORY (pp. 710, 711, 712), said:

"This lien is so sacred and indelible, that it has on more than one occasion been expressly said that it adheres to the last plank of the ship (1 Peters Adm. Rep., Note 186, 195; The *Sidney Cove*, 2 Dodson, 11, 13; The *Neptune*, 1 Hagg. Adm., 227, 239). * * * The lien attaches to the thing and to whatever is substituted for it. * * * The owners and the lienholder whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. * * * The lien will follow the ship and its proceeds in whosesoever hands it may come by title or purchase from the owner." (*a*)

(*a*) In the *Ordonnance* it was said that the seaman's lien for his wages adhered to "the last nail" of the ship. (*Translation*, 2 Pet. Adm., App. 32, 35).

In *Brown* vs. *Lull*, 2 Sumn., 443, Mr. Justice STORY says:

"The wages of seamen attach as a lien to the ship and freight * * * as a claim or privilege having a priority to be satisfied *before all other claims*. As it has been sometimes expressively said, they are nailed to the last plank of the ship."

In *Pitman* vs. *Hooper*, 3 Sumn., 50, Mr. Justice STORY again says:

"The seamen's wages generally constitute a lien or claim upon the ship and freight and upon the proceeds thereof, in whatever hands they may be, which must be paid *before any other claims*. It has been significantly said that they are nailed to the last plank of the ship; a figurative expression, which will be found used in one of the earliest maritime codes in modern times (the Consolato del Mare) of which we have any distinct traces (Pard. Collect. des Lois Mar., tom. 2, p. 129; Concol. del Mare, c. 93, 138). And it may be added that they adhere also to the last fragment of the freight."

Mr. Justice LIVINGSTON, in the case of The *Mary*, 1 Paine, 180, uses the same language as that of Sir WILLIAM SCOTT, above quoted, as regards the priority of seamen's wages.

To the same effect is *Foster* vs. *Steamboat Pilot No. 2*, Newb. Rep., 219.

In The *City of Tawas*, 3 Fed., 170, 172, BROWN, *J.*, said:

"That claims for wages should be paid *in preference to all others*, except the costs of sale, of the ship-keeper and of storage and dockage, while the vessel is in the hands of the Marshal, and excepting also subsequent salvage, is well settled in all the districts."

KENT says (Vol. 3, p. *197):

"Their demand for wages takes precedence of bottomry bond, and is preferred to all other demands: * * * their claim is a sacred lien, and as long as a single plank of the ship remains the sailor is entitled as against all other persons to the

proceeds as a security for his wages, for by their labor the common pledge for all the debts is preserved."

In the note, KENT continues as follows:

"The venerable code of the Consolato del Mare, C. 138, expressed itself on this subject with the energy of Lord Stowell, when it declared that mariners must be paid before all mankind, and that if only a single nail of the ship was left, they were entitled to it (Consulat de la Mer, par Boucher, Tome II., 205; see also Cleirac upon the Judgments of Oleron, Art. 8, N. 31, and Boulay Paty, Cours de Droit Com., Tome I., 115). The preference given to seamen for their wages *over all other claims* upon the ship and freight is the universal law of maritime Europe."

Judge CONKLIN, in his work on Admiralty Jurisdiction (Vol. I., p. 112), says:

"Against the ship and freight, and against their proceeds into whosesoever hands they may come, the seaman's claim for wages *has priority over all other claims*. It is a sacred lien, and as long as a plank of the vessel, or a fragment of the freight remains, the mariner is entitled to it in preference to all other persons * * * *even against the title of the Government acquired by forfeiture*." The *St. Jago de Cuba*, 9 Wheat., 609.

Parsons says (1 Ship. & Admly., 160):

"A bottomry bond is preferred *to any other lien whatever*, excepting only the lien of the *seamen* for wages; and the lien of material men for repairs or supplies indispensable to her safety. The reason of this rule is, that a bottomry bond saves the ship; for it is to be presumed that it was made from a strict necessity; and if it had not been made, the other liens on it would have been worthless. The reason of the exception is, that the bottomry bond itself would never have brought the ship within reach of any persons having an interest in or a lien upon her, had she not been navigated home by the seamen."

(11.) From these numerous authorities, beginning with our early reports, it is clear that the general maritime law as respects the *order* of privileges was long ago fully adopted in this country, and that the

recent departure from that order, in a few cases, in favor of damage claims has no other basis than the mistakes noted in the preceding point (p. 13).

It cannot be contended that seamen's wages constitute merely an *exception*, and that damage liens have priority over contract liens, excepting seamen's claims, for two reasons: (1) The only text book authorities cited contain no such exception. They expressly include seamen's wages, with supplies, bottomry, &c. (2) That only adjudications that have given any color to the contention were adjudications concerning seamen's wages and nothing else.

It is therefore plain that the whole contention of the plaintiff must be tested by seamen's wages. If the adjudications in that regard have been misunderstood or misapplied, the whole contention fails.

If we are right in the above positions, further argument is unnecessary, since it is the function of this Court to *declare* the law, not to invent or to reverse it.* It may be useful, however, to examine the subject in its further relations.

*: 21 Wall. p. 577

IV.

Contract liens are *preferred privileges* because based upon the *necessities* of the ship and upon the *credit* given to the ship to meet her necessities as an instrument of commerce.

The argument upon this point starts with the inquiry—

Why are Liens and Privileges Granted?

These are of two classes: (1) The *quasi general lien* of non-privileged claims covered by the 5th clause of the ordinance (*ante*, p. 25) upon the owner's *surrender* of the ship in exoneration of his liability; (2.) The particular "*privileges*" or *preferences* established for the distribution of the proceeds of the ship.

(1.) The former is an incident of the *limitation of liability* in favor of shipowners, long a doctrine of marine law. The reason for this limitation of liability was the encouragement of navigation, in order that owners might be willing to invest their property in ships for the promotion of commerce, without subjecting their land fortunes to an indefinite reponsibility for the acts of the master (*Norwich* v. *Wright*, 13 Wall., 116–118). This was merely applying to maritime matters, in a different form, the same right of limitation of responsibility that has been attained in the municipal law by means of *corporations* and *limited partnerships* (*Gokey* v. *Fort*, 44 Fed., 364, 367).

The English Statute (Act of George III.) and the American Statutes (Act of 1851, § 4284, R. S., and Act of 1884, 1 Sup. R. S., p. 443, § 18) have confirmed this limitation of liability and consequent *general lien* in our law.

(2.) The express "*privileges*" of the maritime law are a different thing. *Privileges* are the *preferred claims* among the debts of the ship. It is these express privileges that were referred to in the discussions by Judge BROWN in The *Young America*, 30 Fed., 794, 800; *Amos P. Carver*, 35 do., 667, 669; The *Gratitude*, 42 Fed., 299; The *City of Norwalk*, 55 do., 110–112; and it is only the question of *preferences* among the ship's creditors that is under discussion here. The four express "privileges" or preferred claims of the Ordonnance of 1681 have, as we have shown, been preserved inviolate in every maritime country.

(3.) *Why are these preferences accorded?*

Mr. Justice JOHNSON in The *St. Jago de Cuba*, 9 Wheat., 416, says:

"*The whole object* of giving admiralty process and *priority* of payment to *privileged creditors* is to furnish wings and legs to the forfeited hull to get back for the benefit of all concerned, *i. e.*, to complete her voyage. * * * The vessel must get on. This is the consideration that controls every other;

and not only the vessel, but even the cargo is *sub modo* subjected to this necessity. For these purposes the Law Maritime attaches the power of pledging or subjecting the vessel to material-men, to the office of shipmaster. * * * The *necessities* of *commerce* require that when remote from his owner he should be able to pledge his owner's property to that liability without which it is reasonable to suppose he will not be able to pursue his owner's interests."

The same thing has been reaffirmed in our courts times without number. In no jurisprudence more clearly than in the decisions of this Court does it appear that the basis and the exclusive basis of these privileges are the *necessities* of the ship on the one hand, and the *credit* given to *the ship* on the other (The *Kate*, 164 U. S., 458, and the cases there cited). The promise of the *privilege* to the material-man is his inducement to supply the ship's necessities.

(4.) The established *order* of the four express privileges in the ordinance of 1681 confirms this.

(*a.*) *Seamen's wages* hold the first rank, because they are of the highest necessity and needful *to the last* in completing the voyage; also because the claims are small and the men most dependent and necessitous. A further reason for their preference is that they are forbidden to insure their wages (*Ordonnance*, Bk. III, Tit. VI, Art. 15; 2 *Pet. Adm.*, App. 43; 2 *Parsons Ship. & Adm.*, 67; Lord STOWELL in The *Juliana*, 2 Dods., 509; The *Penelope*, 2 Peters, 276).

(*b.*) *Supplies during* the voyage are next, because they are essential in order to complete it and to save all that precedes.

(*c.*) Supplies for the voyage *before departure* are third, because without them the voyage could not begin, nor cargo be transported.

(*d.*) *Damages* to the cargo are *inferior* to the above, because all the preceding are rendered for the

benefit of the *cargo*, as well as of the *ship*, in enabling the transportation to be made, *i. e.*, all are *beneficial* to both cargo and ship, as a joint enterprise. Cargo damages, though not beneficial, are privileged, because the goods were *entrusted to the ship* and upon her *credit;* and the express *credit* of the ship was the reason for this *low* privilege, as against other claims which did *not* arise out of any *credit* of the ship at all, and were of no benefit, while Cargo is beneficial to the Ship in paying freight.

(5.) Damages inflicted on another vessel or her cargo by collision, though a general lien, had no express *privilege;* (*a*) because such a claim does not arise from any *benefit* to the ship (*b*), nor is it based upon any *credit* of the ship; and (*c*) because this claim being ordinarily *secured* by *insurance*, as a sea-peril, there is no *necessity* of commerce, nor any *policy* of the law that calls for any special *privilege* upon such a claim.

At the time of the adoption of the Marine Ordonnance of 1681, marine insurance was universal. The provisions of that ordinance in regard to insurance are very full (2 *Valin*, pp. 205-442). In The *Rebecca*, 1 Ware, 188, 204, WARE, *J.*, pointed out "the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance." This supplied an *adequate security* as against damages in *pure tort* by collision; and there was no occasion or sound reason for giving *insurers* a special privilege, merely for their indemnification; and most especially so when this would destroy, whenever they came in conflict, the liens of the material men and the seamen, and thereby *pro tanto* defeat the very objects founded in necessity and public policy, for which those privileges were granted.

Considering that all cargoes and ships alike are usually *insured*, the decision in *Norwich* vs. *Wright* in placing the pure tort damage on an equality with the merchant freighter's damage, was no doubt practically just and sound policy, as tending to stop useless litigation between different insurers.

Its effect was only to put both in the fourth rank of the Marine Ordonnance.

(6.) These preferences are also required by humanity and public policy. The reasons that have been assigned for making seamen the wards of the admiralty apply with nearly equal force to the pilot, the keepers and watchman of the ship, the stevedore and the materialman, whose liens are generally trifling in amount as compared with the larger claims of ship and cargo in general commercial dealings.

This fact is well illustrated in the present case. The collision claim amounts to $15,000, while the bill for coal was $125 only, and the decree with costs was $218.07. Moreover, it is notorious that damage claims are, in nine-tenths of the cases before the courts, promoted by underwriters who have for a stated premium expressly assumed the collision risk. It is equally well known that small materialmen in practice do not and cannot conveniently ~~dare~~ are, insure their risks, while seamen ~~were~~ *forbidden* to insure their wages on grounds of public policy (*ante*, p. 36). The practical question in nearly every case like the present is, therefore, whether the Court should sanction the right of an insurer of tort liabilities to absorb, as salvage against his loss, the liens of the small contract creditors, whose liens from time immemorial have been fostered and encouraged by the universal maritime law to satisfy the acknowledged needs of commerce, and cannot be otherwise secured.

(7.) It is said that *insurance* is a wholly independent matter, having nothing to do with the rank of a lien or privilege, as between the original parties, and should not be here considered. This is true when the law is *settled*. But it is quite otherwise, if the law is unsettled, and the question arises: Is there any sufficient reason of private right or public policy, for giving a *new* and *special privilege* to a particular class of claims among the debts of a ship to the injury

of others; and still more, when the question is whether a universally established order of privilege is to be reversed? Then "those who impugn the validity of the rule," in the language of Dr. Lushington (1 Eng. Law & Eq., 668) "are bound to show that the exception taken is one well founded," and that there is some controlling reason of practical necessity or private right which calls for the reversal of the established rule, and for the erection of a new privilege; and this is still more obligatory when its operation would be to extinguish claims hitherto considered the most meritorious. In such a case it is right and obligatory that the whole situation should be broadly regarded, in order to determine what practical justice and public policy and the general needs require.

V.

The long-standing maritime law of the commercial world is a part of the law of this country; and upon all unsettled points is an authoritative standard and guide in purely maritime questions like the present, unless it be shown that that law is discordant with our time and its need.

It has been said in this Court that all the commercial nations, including our own, have adopted the general maritime law as the basis and ground work of their maritime regulations; that the general maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to, and that that law was the basis of the system adopted by the Constitution (The *Lottawanna*, 21 Wall., pp. 573, 574, 576).

The extent to which it has been received depends on the maritime usages of this country, as found in commercial practice, in the decisions of the Court, and in such legislation as may have been competent to affect it (*Insurance Co.* vs. *Dunham*, 11 Wall., 1).

In the case of *Butler* vs. *Boston S. S. Co.*, 130 U. S., 527, 556, Mr. Justice BRADLEY, after restating

what had been previously held in several cases, viz.: "That the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country," goes on to say:

"These quotations are believed to express the general, if not unanimous, views of the members of this Court for nearly twenty years past; and they leave us *in no doubt* that, *whilst the general maritime law*, with *slight modifications*, *is accepted as law in this country*, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law has of limited liability. We have rectified that. Congress restored that article to our maritime code."

In the case of The *Harrisburg*, 119 U. S., at p. 213, a right of action for death on the high seas was denied because "the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched," and therefore subject to the municipal law, which gave no such right of action. The clear implication, from the discussion, was that if the maritime law had given any such action, it would have been adopted.

(1.) It is clear that the general subject of liens, and especially the merchant freighter's lien, was adopted by the courts of this country from the general maritime law prevailing on the continent, rather than from English sources.

In The *Phebe*, 1 Ware, 263, 271, WARE, *J.*, said:

"In this country, the lien [merchant freighter's] is not only acknowledged but is enforced by our courts of admiralty, and *having been borrowed from the general maritime law or the customs and usages of the sea, we must look to them*, rather than to our own peculiar maritime jurisprudence *for its true character and the cases to which it applies.*"

See also to the same effect The *Rebecca*, 1 Ware, 188, 193; *Delovio* vs. *Boit*, 2 Gall., 398; *Insurance Co.* vs. *Dunham*, 11 Wall., 36; The *Dolphin*, 1 Flip., 580; *Vandewater* vs. *Mills*, 19 How., 82; The *Virgin*, 8 Peters, 538, 550.

(2.) The legislation of Congress limiting the liability of shipowners adopted that subject from the general maritime law.

(*a.*) This was true of the Act of 1851 (*Norwich* vs. *Wright*, 13 Wall., 104).

(*b.*) The Act of 1884 was apparently based on the continental practice. In *Norwich* vs. *Wright*, 13 Wall., 104, at p. 119, Mr. Justice BRADLEY points out that by the French law of 1841, an exemption was afforded to shipowners from the ship's contract liabilities similar to that later afforded here by the Act of 1884.

(3.) The statutes of various States have adopted from the general maritime law the subject of liens upon domestic vessels, for work, labor and materials (The *Lottawanna*, 21 Wall., 558).

Wherever the maritime law of this country has adopted a complete subject, as that of liens, or of limitation of liability, from the general maritime law, the practice of the Court has uniformly been to refer to that law in the determination of incidental matters arising under it, and to follow the general law in determining such matters, except and unless the provisions regarding the special point as there found, are not adapted to our time or needs.

Having adopted the subject of liens from the general marine law, it is right to refer to that law as evidence of their proper rank. The rank there given the collision lien accords as well with our time and needs, as with the needs of the other maritime nations, in all other time.

VI.

The rank accorded to the different maritime liens in this country, in the main follows the universal maritime law, as embodied in the Marine Ordonnance of 1681.

(1.) *Seamen's wages.* These are usually allowed great priority, for besides the fact that sailors are considered wards of an admiralty court, it is the result of the seaman's labor, which has brought into port, and hence within reach of other lienors, the latter's security, the ship (The *Paragon*, 1 Ware, 326; The *Orient*, 10 Benedict, 620, 626; The *Virgin*, 8 Peters, 538, also cases cited, *ante*, p. 31). Wages have been allowed priority over claims, prior in time, of materialmen and bottomry (The *Virgin*, 8 Peters, 538; The *Superior*, Newb., 176; The *Rodney*, Blatch. & How., 226; The *Aeolian*, 1 Bond, 257; The *Fort Wagne*, *ibid*, 476; The *Melita*, 3 Hughes, 494; The *Virgo*, 46 Fed., 294); over the lien of merchant freighters (The *Paragon*, 1 Ware, 326; The *Leonidas*, Olcott, 12; The *Gratitude*, 42 Fed., 299); *over towage* (The *City of Tawas*, 3 Fed., 179; The *Athenian*, 3 Fed., 248).

(2.) *Supplies and repairs before the voyage begins.* A claim for supplies furnished on a voyage, has priority over a *bottomry* given as security for materials furnished before the beginning of the voyage (The *Boston*, Blatch. & Howland, 309; The *Gratitude*, 42 Fed., 299; The *Samuel Morris*, 63 Fed., 736). This is also implied in the rule that liens lose their priority, if allowed to run into a later voyage; also in the principle that underlies the rule for payment of contract liens of equal rank in the inverse order of creation.

(3.) *Supplies during the voyage.* Those who furnish materials and supplies at a later stage of the voyage have priority over those who furnished them at an earlier stage (The *Omer*, 2 Hughes, 96); over prior bottomry or prior salvage (The *Jerusalem*, 2 Gall., 345; The *Felice B.* 40 Fed., 653; The *Aina*,

40 Fed., 269; The *Olga*, 32 Fed., 329; The *Dora*, 34 Fed., 348; The *E. M. Davidson*, 1 Fed., 259); over a lien for damage to cargo (The *Proceeds of the Gratitude*, 42 Fed., 299). But supplies furnished at the end of the voyage are not prior to wages (The *Virgo*, 46 Fed., 294).

(4.) *The merchant freighters' lien.* This is subordinate to the liens for wages and for supplies (The *Paragon*, 1 Ware, 322, 331; The *Leonidas*, Olcott, 12; The *Young America*, 30 Fed, 789; The *Gratitude*, 42 Fed., 299; The *Samuel J. Christian*, 16 Fed., 796).

VII.

The confusion in the American cases regarding the rank of tort or *quasi* tort liens is of recent origin, is based chiefly on the English cases with regard to marshaling of securities, and on the so-called *dictum* in Norwich Co. *v.* Wright. The reasons assigned in the few cases which have preferred the *quasi* tort or tort lien over the liens for wages and supplies do not justify the conclusion reached.

1. The confusion really began with Judge BENEDICT's decision in The *Pride of the Ocean*, 3 Fed., 162 (1880), where he preferred a claim, arising from collision, over a prior bottomry loan made upon the same voyage, basing his decision chiefly (p. 166) on a *dictum* of Doctor LUSHINGTON in The *Aline*, 1 W. Rob., 118, that the relation of the bottomry lender to the shipowner was voluntary, while that of the damage claimant to the offending ship was involuntary. In The *Pride of the Ocean*, 7 Fed., 247, BENEDICT, *J.*, preferred a collision lien over the claim of a master of a British vessel, claiming wages by virtue of a British statute. The master did not press his claim until after a decree for the collision damages had been entered. The decision was rested partly upon that ground, and upon the further ground that having

been master of the ship, at the time of the collision, he was personally liable for the damage caused by it.

In 1879, Judge CHOATE had decided the case of the Steamboat *Orient*, 10 Ben., 620, holding that the wages of seamen had a priority over a damage claim arising from *quasi* tort (*vid* his opinion, *ante*, p. 16).

The next case was that of The *Maria and Elizabeth* 12 Fed. Rep., 627, decided by Judge NIXON in 1882. It appears from a prior report of this case (7 Fed. Rep., 252) that the question was one as between a claim for pure tort and seamen's wages. It came forward in a limitation of liability proceeding. Judge NIXON's decision was based upon the following considerations: (1) The English cases (which are shown under Point II, to be inapplicable); (2) "The mariners of the wrong-doing ship may be supposed to share in the fault of the vessel"; and (3) the so-called *dictum* in *Norwich Co.* vs. *Wright*.

In 1883, BENEDICT, *J.*, decided The *Samuel J. Christian*, 16 Fed. Rep., 796. The claim there was between (1) a *quasi* tort lien (2) and liens of seamen and (3) liens of material men. The decision was in favor of the seamen and material men, Judge BENEDICT saying (p. 799):

"A different rule applied in the present case would give to MacNab (brig owner), a security for his demand greater than the security for which he entered into his contract. He would be paid out of the proceeds of the tug, *and discharged of the liens of the material men*, whereas, when his contract was made, the tug was subject to those liens."

Judge BENEDICT further said (p. 797):

"I concur in the conclusion arrived at by Judge CHOATE in the case of The *Orient*, and cannot concur with the contrary conclusion arrived at by Judge NIXON in the case of The *Mary and Elizabeth*, 12 Fed., 627. The *dictum* of Mr. Justice BRADLEY in *Norwich Co.* v. *Wright*, 13 Wall, 122 * * * cannot, as it seems to me, be considered to be an adjudication by the Supreme Court of the United States upon the point in controversy. * * * In such a

case I should be sorry indeed to hold that the seamen were to be remitted to an action *in personam* for no other reason than to prevent the owner of the brig from being so remitted. If either is to be turned over to an action *in personam*, in my opinion, it is not the seamen."

In The *M. Vandercook*, 24 Fed., 472, decided by Judge NIXON in 1885, he held that a claim for damages to a vessel and her cargo, caused by the negligence of the tug while towing her, in pursuance of a contract, has priority of payment over liens for repairs and supplies to the offending vessel. The decision was based (1) upon a passage in *Abb. Ship.*, 10th Ed., 533, setting forth a doctrine not justified by the English cases, and (2) upon the words of Mr. Justice BRADLEY in *Norwich* vs. *Wright*.

The next and most thoroughly considered case up to this time was that of The *Young America*, 30 Fed., 789, decided by Judge BROWN in 1887. It was there held, after an exhaustive survey of the law in this country, in England, and upon the Continent, that the lien for supplies outranks that for damage caused by negligent towage.

In The *Amos D. Carver*, 35 Fed., 665, 1888, Judge BROWN held that the lien for necessary repairs and supplies outranks a subsequent lien arising from negligent collision. In this case, the rule previously laid down in the *Young America* (*supra*) as to *quasi* torts was applied and extended to cases of pure tort.

This was followed by The *R. S. Carter*, 38 Fed., 515, decided by BENEDICT, *J.*, in 1889, where he held that a pure tort claim arising from negligent collision has priority over a lien for materials and supplies which attached prior to the collision. The reasons assigned for the decision were (1) the Judge's prior decision in The *Pride of the Ocean*, 3 Fed., 162, where he subordinated a prior bottomry to a subsequent damage claim; (2) Judge NIXON's decision in The *M. Vandercook* (*supra*); (3) one whose claim arises from a voluntary relation to the shipowner should be postponed to

one whose demand arises involuntarily; and (4) one who gives time becomes a party to the employment of the vessel, and has a beneficial interest in that employment.

In The *R. S. Carter*, 40 Fed., 331, decided in 1889, Mr. Justice BLATCHFORD affirmed the decision of Judge BENEDICT (1) upon the authority of the English cases as erroneously stated in *Abb. Ship.*, 11th Edition, 621; and (2) on the remarks of Mr. Justice BRADLEY in *Norwich* v. *Wright*. He adduced no fresh reasons for his decision. He thus sustained the doctrine that a lien for pure tort has precedence over a maritime lien for materials, but was unsuccessful, as we submit, in attempting to distinguish his own decision in The *Frank G. Fowler*, 21 Blatchford, 410, wherein he had held that as between two liens for a collision, arising from negligent towage, the latter having arisen upon a subsequent voyage, that which first attached had priority. Unless a lien arising from collision invests the lienor with a special property in the ship, differing in some unexplained way from that which he derives under a lien for materials, these two cases decided by the learned Justice appear to be in vital conflict.

In the next decision, that of Judge SEVERNS, rendered in the same year, The *Daisy Day*, 40 Fed., 538, it was held that a seaman's lien for wages is superior to damages from negligent towage, but that a lien for supplies was not. The decision was based partly upon *Norwich* vs. *Wright*, the learned Judge concluding that the Court, in that case, did not assume to pass on the lien for wages, but did pass on the lien for supplies as compared with that for collision damage.

In the proceeds of The *Gratitude*, 42 Fed., 299, BROWN, *J.*, in 1890, adhered to his opinion as expressed in The *Young America* (*supra*), and again awarded priority to a lien for supplies over liens for damage to cargo and damage arising from negligent towage on the same voyage.

In The *F. H. Stanwood*, 49 Fed. Rep., 577, decided in 1892 by GRESHAM, *C. J.*, and JENKINS, *D. J.*, sitting in the Court of Appeals for the Seventh Circuit, it was held that a lien for damage, caused by negligent collision, has precedence over the lien of the crew of the offending vessel for prior wages. JENKINS, *J.*, rested the decision upon the grounds (1) that the seamen share in the fault of the offending vessel, and (2) that the seamen have two remedies for their damage, while a second remedy is denied to the damage claimant, and (3) on the English cases with regard to marshaling.

There was no question of limitation in this case, and the Court expressly found the owner was solvent. The proper course would have been for the Court to have paid the seamen, and have left the damage claimant to his remedy *pro tanto* against the owner (per BENEDICT, *J.*, 16 Fed., at p. 797), upon the principle stated in The *Virgin*, 8 Peters, 538, 553, or, to have compelled the seamen on payment of their wages, to grant an assignment to the damage claimant, upon which he could have sued the shipowner personally in their right.

In The *Nettie Woodward*, 50 Fed., 224, decided in 1892, SWAN, *J.*, held that a lien for collision damages takes precedence of that for seamen's wages accruing prior to the collision. The decision was based: (1) Upon the cases of The *R. S. Carter* and *F. H. Stanwood* (*supra*) and (2) on the ground that the vessel was English and that the seamen were postponed under English law.

In the case at bar, Judge Benedict (58 Fed. Rep., 792) held that the lien arising from negligent towage, and ~~from~~ that from materials previously furnished, stood on a parity, and that the claim of the materialman should have priority because his lien attached first.

The English cases, on which some of the foregoing opinions were based, have already been dealt with. It remains only to consider the other reasons assigned for the priority of the quasi tort or tort lien.

2. The definite provisions of the maritime law as univerially administered for centuries past necessarily *imply the overruling of every one* of the reasons put forth in favor of the superiority of a pure tort lien; since there is *nothing new* in any one of these reasons. Every fact, circumstance and argument now cited, existed as distinctly, and was as clearly appreciable in all past maritime history as now, and every one of them has been universally overruled.

(1.) Of course we do not include in the above the *dictum* in *Norwich* vs. *Wright* (13 Wall., 104). That ought not to be regarded as even a *dictum* of Mr. Justice BRADLEY. It plainly is not so; it is merely a passage from Maclachlan, quoted and condensed, for the purpose of applying the last part of it, which alone had any application to that case.

(2.) When we search for any principles or sound reasons for elevating cargo damage-claims above wages and supplies we find that the only decisions favoring this change (*Vandercook*, 24 Fed., 472, and The *Daisy Day*, 40 Fed., 538), were based wholly on the above *dictum*, without any other reason or principle.

(3.) In other cases of *pure tort* as against supplies or wages, the reasons adduced seem to be some one or more of the following:

(*a.*) As to wages that the seamen are often actually in fault; and if not, that they should at least be constructively deemed to be in fault, and therefore have their lien *postponed* (The *F. H. Stanwood*, 49 Fed., 577). But the Consulado and all subsequent marine law say no (see also conclusive answer by CHOATE, *J.*, in The ORIENT, *ante* p.):

(*b.*) That the seamen can sue the owner *in personam*, and should therefore let the ship alone and leave her to the damage-claimant. Same answer. [Here both claimants also have the same identical remedies as Dr. LUSHINGTON noted in The *Louisa Bertha*,

1 Eng. Law & Eq., 665; there cannot be any marshaling of assets here].

(*c.*) That the seamen and the supplymen dealt *voluntarily* with the ship, which the pure tort claimant in collision did not do, and was not this so from the beginning?

But *Norwich* vs. *Wright* adjudged that the pure tort claimant has only the same rank as the merchant freighter on the offending ship, and the latter does deal with her voluntarily.

That case, therefore, necessarily *adjudged* that *this circumstance makes no difference.*

The idea that a *voluntary* dealing with the ship might subject the interest of lienors to confiscation for the benefit of a *subsequent damage-claimant* originated in a *dictum* of Dr. LUSHINGTON, in The *Aline*, 1 Wm. Rob. III. It has never got lodgment in any English adjudication. It was, however, adopted in The *Pride of the Ocean*, 3 Fed., 162 and in The *R. S. Carter*, 38 Fed., 515; 40 do, 333. This idea has no analogy in its support in the municipal law. It is directly contrary to the provisions of the general maritime law, which *in view of these very contingencies of navigation*, gave the seamen and the supply men their superior privilege. In the municipal law it might just as well be urged, that the *mortgagee* of a horse which had been driven by the owner so as to injure another, could not set up his mortgage interest against an execution levied on the horse in favor of the damage claimant.

Can any reason be assigned why a mere damage claim, not arising out of any trust, credit or voluntary dealing between the parties, should have any better status, as respects a fund distributable among the creditors of a ship, than any ordinary damage claim has that is presentable against the assets of a bankrupt? The fact that the relation between colliding ships is *involuntary* reduces the damage claim to that of a mere *ordinary* tort, with the *ordinary* legal liability. Instead of being any reason for any

special privilege over other debts of the ship, it is a conclusive reason *against* any special preference, for the reason that there was no special credit, trust or confidence as the basis of it, and so the maritime law has always held.

(*d.*) Again it is asked, "May not a material man *who gives time* be fairly held to become *a party to the employment* of the vessel in the course of which the accident occurred, since he has a *beneficial interest* in that employment" (38 Fed., 515)?

We say no, and for several reasons.

(1.) It is not true that the material man has legally any *beneficial interest* in the employment of the vessel; he has no *lien* on her earnings or any legal *interest* in them. His lien on the vessel is precisely the same whether she earns anything or not, or whether she is employed or not.

(2.) He cannot rightfully "be *held* to become a party to her employment," because he is *not so in fact;* not having the least voice or control in regard to her employment.

(3.) The question assumes that the material man is to be punished for "*giving time*"; whereas, the reason and the only reason why the law gives him a *privilege* is to *induce* him to give time, viz., to supply the ship with *necessaries* on *credit*, when the ship could not otherwise obtain them. To induce him to "give time," and then to take away his lien because he gave it, is nonsense.

(*e*) ~~(*b.*)~~ That by thus dealing voluntarily with the ship and getting a *privilege* upon her, either for wages or for supplying her necessities, their interests in her ought to be forfeited to a vessel damaged by the ship's subsequent faults. In other words, that the whole ship must be devoted exclusively to the damage claims. But this situation was the same from the times of the Consulado; and that Code and the marine law generally have expressly overruled this contention.

Can such arguments as these be deemed to be entitled to any weight now when they have been so long and so decisively overruled?

The very fact cited by the appellants that Emerigon thought the merchant's damages was classed too low, shows the consideration given to the subject; and that Emerigon states positively that the classification of the Ordonnance "*neither creates any new privilege, nor takes away any that existed before,*" while Boulay-Paty says: "This rule is *very ancient* in the usage and the customs of these a" (see citations, *ante*, pp. 27, 28).

Nothing in the marine law has ever been better settled than the invalidity of all these objections. The appellant's whole case is in truth nothing more than an endeavor to overturn one of the oldest rules in jurisprudence, because of some doubts raised by recent cases based on the mistakes of a few English text books.

We ask the especial attention of the Court to the exhaustive discussions in the *Young America*, 30 Fed. Rep., 789; the *Amos D. Carver*, 35 Fed. Rep., 665; proceeds of the *Gratitude*, 42 Fed. Rep., 299; where the reasons for according priority to the claims of materialmen over the claims of damage caused by collision, whether due to negligent towage, or to pure tort, will be found fully set forth.

VIII.

The question of the *normal rank* of the two liens is now presented without embarrassment by any special circumstances connected with the limitation of liability or the marshaling of different securities held by opposing lienors. Both creditors here have precisely the same remedy.

(1.) It is at least doubtful whether it is justifiable in any case arising under the maritime law, to displace

the lien of seamen or of materialmen by the application of the land law of *marshaling securities*. No warrant for this is found in the *older law*. Every reason and circumstance that can be cited for such a rule now has always existed, yet it was never a part of the marine law. It is a recent conception of Dr. Lushington, which the English Court of Appeal has with hesitation sustained. It is directly contrary to the spirit of the maritime law, which was intended to give a direct, a certain, and a speedy remedy in the maritime courts against the ship itself. The seamen's lien, says Cleirac, "clings to the last nail of the ship." This new doctrine takes away from the seamen this direct and certain remedy, and substitutes the inferior, slower, and uncertain remedy in *personam*. As applied in England, and as against the *foreign seaman* only, when his ship has been confiscated, and the seaman turned out of the ship without a pittance, and practically told by the Court to get home as best he can, and sue the owner, if he can find him—this policy, as contrasted with the humane spirit of the maritime law, is but refined barbarism. To us this seems a shocking departure from the marine law, which it is inconceivable that this Court can sanction.

In every case where the shipowner remains liable to seamen beyond the value of the vessel, the wages claim should nevertheless be first paid from the fund; for the damage claimant would have the same remedy *in personam* against the shipowner for the amount deducted, that the seaman would have.

(2.) The present case is, however, wholly free from these questions:

(*a.*) Because this is not a case of limitation of liability, nor has there been any surrender of the ship.

(*b.*) It does not appear but that the tug owner was in charge of the navigation (which is frequently

the fact), and that the damage to the schooner arose by the tug owner's privity or fault, in which case there could not be any limitation of liability (Rev. St., Sec. 4283).

(c.) The Act of June 26, 1884 (23 St. L., p. 57; 1 Sup. Rev. St., p. 443, § 18), provides:

"That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

That act extends the owner's limitation of liability to *contracts*, as § 4283 had previously done to torts. The personal remedy for *wages* is, however, retained; but not any personal remedy for *supplies*. In this respect, therefore, the two claims in the present case, viz., the claim for supplies and the claim for damage to the tow, stand upon exactly the same footing. Either both claims have both remedies, or both claims have but the single remedy *in rem*. As both stand alike in that regard, there are no *different securities* to be marshalled, and the case must be decided, therefore, upon the *normal rank* of the liens themselves.

(3.) The English cases, in which, by marshalling the securities as between seamen and damage claimants, the seamen were remitted to their personal suit against the shipowner, are not in harmony with the spirit of our law. These are referred to under Point II. A similar marshaling of assets was applied in the case of The *Trident*, 1 W. Rob., 29 (overruled by Dr. LUSHINGTON in the *Priscilla*, 1 Lush., 1); The *Constancia*, 4th Notes of Cases, 285;

The *Mary Ann*, 9 Jurist, 95; and The *Dewthorpe*, 2 Notes of Cases, 264. In these cases, where one creditor had the security of both ship and freight, and the other creditor a security on the ship only, the first was required to take his relief from the freight. In The *Mary Ann* this was applied as between the bottomry holder and seamen's wages; and in The *Dewthorpe*, as between a bottomry bond and claims for pilotage, towage and seamen's wages.

These decisions like those before referred to (Point II), were made without reference to the *rank* of the lien, and were plainly independent of it; nor did they purport to affect in the least the conceded *superiority* of the *rank* of the seaman's wages, where only a single fund was available.

This is made clear by Dr. LUSHINGTON'S own statement, in his opinion in the case of The *Louisa Bertha* (Nov., 1850), in which a similar marshaling of assets was claimed as against the seamen, in a case of several different bottomry bonds (1 Eng. Law, & Eq., 665).

That case furnishes an amusing illustration of the readiness of Dr. LUSHINGTON to disregard his own *dicta*. He there said:

"The general rule, no doubt, is this: that seamen's wages are considered as a lien on the ship, and are entitled *to a priority as against all other claims;* and *those who impugn the validity of the rule are bound to show that the exception which is taken is one well founded.* * * * It is perfectly true that the mariners might proceed against the owners and master, according to the general law; but I have no doubt that the *owners of the cargo* may proceed against the owners of the ship. I have been *pressed* with the case of The *Mary Ann*, and with *an opinion I am reported to have expressed in that case;* but I *find that the opinion so expressed was a mere dictum*, and *I will never hold myself bound* by an observation so thrown out, and *not called for immediately by the circumstances* upon which I had to give my judgment" (1 Eng. L. & Eq., 668, 669);

and in that case, he refused to marshal the seamen out of Court.

We ask of this Court nothing more than the simple application of Dr. LUSHINGTON'S own rule.

IX.

The appellant's contention that the statutes limiting liability give damage liens a priority is ill founded.

The statute contains no such provision. It says nothing about liens or privileges. To get discharged from *personal liability*, however, the owner must *pay* what the statute requires, viz., "the value of the ship and the freight pending" (§ 4383), or *surrender* the ship and freight (§ 4384). Prior to the Act of 1884 (1 Sup. R. S., 443, § 18), as the owner was bound to pay the full value of ship and freight to *damage* claimants, he was required to *clear off* all superior *contract* liens before he could be discharged, *Ben. Adm.* (3rd Ed.), p. 444; since the Act of 1884, as contract debts of the voyage are also included in the exemptions, except seamen's wages, they participate in the *proceeds of the ship* surrendered; as neither statute in the least disturbs the status of those debts as liens, they must be paid according to their rank.

But in this case there is no limitation of liability before the Court.

X.

The fact that the ship is the *instrument* of the damage is not the reason nor the basis of the damage lien as the appellants suggest.

(1.) If this were any ground for a lien, a vessel in *tow* of a tug would be obliged to respond for the damage inflicted by her upon another vessel through

negligent towage, though the tow was not in fault. For she alone is the *instrument* of the wrong, and was badly navigated. The contrary has been decided, first in the case of The *John Fraser*, 21 How., 184; and afterwards upon elaborate discussion in the leading case of *Sturges* vs. *Boyer*, 24 How., 110. In the opinion of the Court delivered by Mr. Justice CLIFFORD (p. 123) it is said:

"Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. *Unless the owner and the person or persons in charge of the vessel* in some way *sustain towards each other* the relation of *principal and agent*, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug or ship the crew, nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel and they are responsible for his acts in her navigation (*Sproul* v. *Hemmingway*, 14 Pick., 1; 1 Pars. Mar. L., 208; The Brig *James Gray* v. The *John Frazer et al.*, 21 How., 184)."

In this decision *figures of speech* play no part. The question, it was held, must be determined solely upon the doctrines of principal and agent; and it was held that this relation does not exist where the towage is under an *independent contract* with the owner of the tug, and the master and crew of the

tug are neither appointed nor subject to control of the owner of the tow.

It is the same with *lienors*. Manifestly a material man has not the least relation of principal to the *ship*, or to the *master* or *crew* of the ship, to which he furnishes supplies; nor has he the least *control* over the ship master or crew, and his interest in the vessel as lienor cannot, therefore, upon any such principle be subordinated to the subsequent damage lien.

(2.) The contention also that by virtue of his lien the material man is in the situation of a *co proprietor* of the ship, and that, therefore, by permitting the vessel to proceed upon her voyage his interest as lienor, like that of the owners, should be subjected to a damage lien arising on the voyage, is practically the same contention in another form, and receives the same answer.

This contention was explicitly overruled by Mr. Justice BLATCHFORD in the case of The *Frank G. Fowler*, 17 Fed., 653, where he held that a collision-damage lien, acquired against a tug, did *not* become subordinated to a similar collision-damage lien acquired upon a different voyage 19 days afterwards, but that it retained its priority, though there was abundant opportunity during the 19 days to arrest the tug for the enforcement of the prior lien.

If such a subordination should be enforced in any case, it should be where the prior lien was for *no benefit* to the ship, as in that case.

(3.) The conclusive answer, however, to this contention and the contention that all prior interests in the ship must be subordinated to a damage claim, is that no such principle is anywhere to be found in the maritime law, but that as respects beneficial liens like the present the marine law has expressly declared otherwise for centuries past. Such liens at all times have had priority over mere damage claims; and it is idle to invent unfounded hypothe-

ses and false reasons to reverse this long-settled rule. The special *privilege* is promised and given by the law to the material man as *an inducement to supply the ship's* necessities on *credit*. It cannot, therefore, be subordinated to a mere subsequent damage claim to which the lienor is not privy without falsifying this promise, and annulling the very policy which was the ground of the privilege.

XI.

The policy and maxims of the maritime law, preferring the minor claims of seamen and claims for necessary supplies, as against the broader damage claims of the owners of ship and cargo, are substantially re-enacted in numerous State statutes, including that of New York.

Liens upon domestic vessels, covering amongst others (1) wages of seamen; (2) supplies both before and during the voyage; (3) breaches of contract and affreightment, and sometimes (4) injuries to property which would include collision damage, have been adopted by statute in a number of the States, the relative rank of these liens, amongst themselves, being preserved in the order given in the general maritime law, following the clasification of the Ordonnance of 1681 (*New York*, Laws 1862, Ch. 482, Sec. 1; *Louisiana*, Civ. Code, Art. 32, 37; *Massachusetts* Pub. Stat., Ch. 192, Sec. 14; *California* Code Civ. Proc., 813; *Washington* Code, Sec. 1939).

Although the rank specified for different maritime liens by State legislation is not binding upon the Federal Courts (The *J. E. Rumbell*, 148 U. S., 1), these statutes nevertheless declare, in the most authoritative form the adaptedness of the maritime law, as hereinbefore expressed, to the needs of our

time and people, and call upon the Court not to forsake, but to enforce, the true maritime law.

XII.

The practical results of reversing the established order of privileges would be unfavorable to commerce.

As previously stated, claims for damage to ship or cargo are in ninety nine cases out of a hundred *insured;* the suits upon them are usually to *indemnify the insurers.* If the damage liens were allowed a privilege superior to wages and supplies, the latter claims, usually comparatively small, would be eaten up and lost. Not only would the order of privileges carefully established by the marine law for centuries past be thereby reversed, but the *very purpose* of the law in establishing any privileges at all would be thwarted.

Privileges (*i. e.*, preferences among claims that are all debts of the ship and therefore *quasi* liens), are in *derogation of common right.* The situation of the proceeds of a ship as respects her own creditors is much like that of the assets of a bankrupt. All preferences are prejudicial to the non privileged. They cannot be justified at all, except upon clear grounds of private right or public policy.

Seamen have the *highest* privilege (1) because of the *necessity* for their services; and also (2) from public policy, to induce always and at every stage of the voyage their highest efforts for the safety of all concerned, and for that reason they are prohibited to insure their wages; and (3) from their own dependent and necessitous condition; these considerations demand the highest security for the speedy payment of the pittances due them.

Seamen are prohibited to insure their wages, from public policy, in order to secure their highest exer-

tions to the last, to complete the voyage, or in case of disaster to preserve as much of the wreck as possible. This enures to the benefit of *insurers* as well as *owners*. Having thus prohibited the insurance of wages in order to secure their highest efforts for the benefit of the insurers, and under the promise of the law of a "special security upon the ship, or any wreck preserved," even to the last nail (*Ordonnance*, Lib. III., Tit. iv., Arts. 9, 19; 2 Peters' Appendix, 32, 35), is it not absurd to deprive them of this security, practically for the benefit of insurers only?

Supplies must be privileged, because of the ship's *necessities*, and the *necessity* of this *privilege* in order to obtain them; public policy likewise ordains this privilege, in order that commerce may thrive, and not halt or languish, from the want of the necessities of navigation or of ready means of obtaining them, through the hypothecation of the ship.

No such necessity, no such reasons of public policy exist in favor of damage claims for pure tort. No necessity, for they are insured. The insurers need no such *privilege* for they are fully paid by rates of premiums *fixed* by themselves, to which all ships and cargoes contribute the wrong-doing vessel as much as the other.

It is said that the seamen would thereby be made more careful; but this cannot be said of the supply man, who has nothing to do with the navigation, and who would only be the less willing to supply the ship's needs. And as regards the seamen, it is obvious that the suggestion has no force; since their interest in their wages and in the preservation of their own lives, is already so strongly bound up in the safety of their ship that no superior lien given to the other ship in collision could increase either their care or their efforts; on the contrary, by subordinating their claims, all further inducement would be taken away, after collision, to save as much as possible of what was left.

To elevate the *pure tort* lien above the rank which

it now holds, along with cargo damage, and to put them both above wages and supplies, would manifestly be destructive of the *very objects* for which privileges have been allowed; and it would remove *pro tanto* every reason for their existence. Not a single circumstance or reason exists now to support such a change in the law that has not existed, and in the same degree, in all periods of maritime history. But from reasons of necessity, public policy and humanity combined, the marine law for centuries past has been settled in favor of the privileges of seamen and the material man above the damages claimed. Long experience has only solidified this principle and embeded it in the code of every maritime nation. Express legislation in many of our States, down to the present moment, has confirmed this policy by everything in its power. No rule, in the whole realm of the law, has been longer or more universally approved than this by the general judgment of mankind. Upon a question of general policy and necessity, to disregard this well-nigh universal judgment; to reject the teachings of centuries of experience and trial, and to overturn and reverse the humane policy of ages past among all maritime nations, and to do this for scarcely any other practical result than to *indemnify insurance companies* who have insured against these very risks and been paid for doing so, would be a travesty upon the marine law, which this Court, we are confident, cannot sustain, and with difficulty can even seriously consider.

XIII.

Attention should perhaps be called to the following inaccuracies in appellant's brief and passages that may be misleading.

1. (p. 3.) The *Aline*. Though the remarks of Dr. LUSHINGTON quoted are *conceded to have been obiter*

(see also *Abb. Ship.*, 13th Ed., p. 874), it is stated that it has always been followed. We have found no such adjudication on the point here raised, and none has been cited.

2. (p. 4.) The *Malek Adhel*. The passage quoted has no reference to support the proposition that "the *entire* damaging vessel is devoted to making restitution to the injured party." Neither this nor any other case in this Court intimates that idea.

3. (p. 5.) The *China*. The italicised words "in preference to other creditors" refers only to the owners other *non*-maritime creditors. The passage is taken by Mr Justice SWAYNE from The *Phoebe*, 1 Ware *p. 271, where the context makes this clear.

4. (p. 6.) *Curious logic*. "It is a necessary consequence of this rule *in rem* that the *entire* value of the damaging vessel becomes a pledge to the injured party for restitution." This amounts to saying that if one man has a pledge nobody else can have one on the same ship.

5. (p. 6.) *Norwich* v. *Wright*. It was *not* there "determined that *only* the liens for collision could come into concourse." No question of other liens or of contract liens was before the Court. Besides, the question there was as to the right to limit liability under the Act of Congress (§ 4284, R. S.), and to sustain that limitation the terms of the act must be complied with, without reference to the rank of different liens.

6. (p. 7.) The *Arturo*. The passage quoted does not sustain the proposition for which it is cited.

7. (p. 7.) The *Boston*. The freighter's lien there was not for "damage to cargo," but for the *sale* of cargo in a port of distress—a forced *loan;* and the bottomry bond was postponed because given on a

prior voyage. The case was one of two *contract* liens.

8. (p. 7.) The *America*. No one accepts this, because it agrees with nothing else in the law. Mr. Justice BLATCHFORD (in The *Frank G. Fowler*, 17 Fed., 665) said: "It is not sustained by authority, nor sustainable on principle."

9. (p. 7.) *Justi Pon* v. *The Arbustei*. The supply claim there was not regarded, *because* it was secured by a mortgage and therefore held not to be a maritime lien at all.

10. (p. 8.) The *Frank G. Fowler*. Mr. Justice BLATCHFORD'S decision that the prior lienor, by suffering the vessel to depart on a new voyage on which a second collision claim arose, *did not* subordinate his lien to the latter, is necessarily destructive of the appellant's contention.

11. (p. 9.) The *Maria and Elizabeth*. The damage claimants under § 4284 were no doubt, entitled to the full value of the vessel in the limitation proceeding, or could have pursued the owner elsewhere for the amount taken from it by prior lienors. The error was in giving an exoneration of the owner or accepting a *surrender* from him without a previous discharge of the contract liens, as required in the Second Circuit.

12. (p. 10.) The *Mellita*. Judge GILES did not so *hold*. That question was not involved; though he cited the cases referred to.

13. (p. 10.) The *Lillie Laurie*. WOODS, Circuit *J.*, gave seamen priority over the damage claims; but subordinated the *State* lien for supplies because not strictly a maritime lien, while the damage to lien was maritime—a distinction since overruled.

14. (p. 10.) The other cases cited are really based on the *dictum*, so called, in *Norwich* v. *Wright* (dealt with under Point I.).

15. (p. 11.) It was not "*conceded* by the Court" of Appeals below "that the damage claim would prevail," &c. Judge BENEDICT'S decisions on this point are irreconcilable (*vid.* Point VII.).

16. (pp. 11-18.) The distinction between pure torts and quasi torts, growing out of the negligent performance of contracts, has been long recognized in the law. The *quasi* tort is *ex delicto;* but this will not help the appellants. The whole discussion is immaterial under the adjudication in *Norwich* v. *Wright*, which elevates the pure tort lien to a position of equality with the *quasi* tort lien for goods on the delinquent ship.

17. (p. 16.) The passage quoted from Judge SEVERENS, so far as it refers to the New York cases as "*conceding*" the priority of damage claims is a mistake.

18. (p. 19). The argument that the safety of life and property at sea will be affected by upholding the priority of the supply claim, is far fetched. The safety of their own lives now affords the highest motive for seamen to avoid collisions. It is improbable that under any rule the Court may lay down, seamen, in critical moments, will stop to think who will have a prior lien on what is left of their ship-materialmen, or the damage claimants. It can make no difference to the owner; as *ex hypothese* he will lose the ship anyhow. It can hardly make a difference to him who will get the proceeds.

19. (p. 19.) The argument that by upholding the supply lien an incentive would be given to run harbor tugs "plastered over with supply liens," ignores the rule laid down in the Southern and Eastern Districts of New York (The *Gratitude*, 42 Fed., 299; The *Samuel Morris*, 63 Fed., 736) that liens of materialmen on harbor vessels *lose their priority*, if not enforced within forty days. It is incredible that in every forty days, new liens, enjoying priori-

ties, could form a very thick "plaster" on a tug (see also The *Grapeshot*, 22 Fed., 123; The *Amos D. Carver*, 35 Fed., 665). The Ordonnance confined the privilege to creditors of the voyage (2 Peters' Adm., 38, § 10). The duration of the privilege is within the control of the courts.

20. (pp. 20, 21.) *Effect of limited liability statutes.* The argument that these give damage liens a priority was demolished by Judge CHOATE in the *Orient* (*ante*, p. 16). The New York cases hold that the statute makes supply debts liens. The Act of Congress of 1884 limits the shipowner's liability for the debts of the ship as well as for her torts. Neither this nor the former statute of 1851 assumed to interfere or in any way deal with the normal rank of liens.

21. (p. 19.) The statement that "other supply liens that are not in the class of bottomry are usually doubly secured, having, along with the lien, a remedy *in personam*, which certainly postpones them to collision creditors who can only look to the offending *res*," ignores the Act of 1884, which limits the remedy of materialmen, as well as damage claimants, "to the offending *res*" (*Vid.* Point VIII, p. 53).

22. (p. 27.) *The continental procedure.* This differs from our own in form only; in substance and effect both are alike. The old English practice was undoubtedly the same as the continental (*Clerke's Praxis, translated in Hall's Adm.*, p. 60; *Brown's Civil and Adm. Law*, pp. 143, 397). The latter authority (p. 143) says:

"The torts of the master cannot be supposed to hypothecate the ship; nor, in my humble judgment, in strictness of speech, to produce any lien on it. How, then, is the ship forfeited and lost to the owner by his captain's misconduct? In my apprehension, only in this collateral way, that it is (agreeably to the practice of the Roman law as to its own citizens, extended by the modern maritime law to

foreigners) arrested until he gives bail or *fide jussore*, and sold for defaults and contempts if he will not appear."

See also the *Dictator* [1892], Prob. 304; the *City of Norwalk*, 55 Fed., 111; *Zouch. Adm.*, 125.

23. (pp. 27, 33.) In France and most other Continental States, while there is no privilege for collision damage, a *quasi* lien arises by implication, from the limitation acts, under which the collision claimant is paid out of the proceeds of sale, after discharge of the privileges, but before the shipowners non-maritime creditors. That he is postponed to the mortgage, is due to a special statutory provision, different, in that regard, from the general maritime law. We only ask the Court to regard, as evidence of that law, such portions of the French Code, as follow the rank of the ordonnance and accord with the prevailing marine law.

24. (pp. 27, 28, 29.) The argument that the rank of privileges on vessels, embodied in the later continental Codes, "cannot be an authority in our Courts," for the reasons assigned under the headings (*a*, *b*, *c*, *d*) invites an irrelevant discussion. It has not been claimed that such ranking of privileges is "an authority", nor is it at all material, save and in so far as such ranking preserves the relative rank of the four classes of privileges contained in the ordonnance. Finding the merchant freighters' lien universally postponed to that of wages and materials, in the 1681, and in 1897, we merely refer to that circumstance as evidence of the general maritime law on the subject.

25. (p. 31.) *Ship to make compensation.* While this was affirmed in some of the ancient Codes, its meaning is obscure (*vid. ante*, p. 24); but in none of the many collections of laws cited is there any provision for *priorities*, except that the wages of seamen were preferred.

Last Point.

The question certified should be answered in the negative.

NEW YORK, Jan. 23, 1897.

Respectfully submitted,

J. PARKER KIRLIN,
Of Counsel for Appellees.

THE JOHN G. STEVENS.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 25. Argued January 27, 1897. — Decided April 18, 1898.

A collision between two vessels by the fault of one of them creates a maritime lien upon her for the damages to the other, which is to be preferred, in admiralty, to a lien for previous supplies.

A lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a lien for supplies previously furnished to the tug in her home port.

In a pending appeal in admiralty by Edward H. Loud and others, owners of the schooner C. R. Flint, from a decree of the District Court of the United States for the Eastern District of New York in favor of Frederick H. Gladwish and others, coal merchants under the name Gladwish, Moquin & Company, the Circuit Court of Appeals for the Second Circuit certified to this court a question of the priority of maritime lines on the steamtug John G. Stevens, arising, as the certificate stated, upon the following facts:

"The home port of the tug was New York. Between December 7, 1885, and March 7, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York of 1862, chapter 482, thereby creating statutory liens on her. On March 8, 1886, the tug John G. Stevens was employed in the port of New York to tow the schooner C. R.

Flint through the waters of said port, and, while towing, negligently allowed the C. R. Flint to collide with the bark Doris Eckhoff in tow of the tug R. S. Carter.

"On March 16, 1886, Loud and others, owners of the C. R. Flint, libelled the John G. Stevens and the R. S. Carter in admiralty, in the District Court of the United States for the Eastern District of New York, for the collision damage. On March 16, 1886, Gladwish and others libelled the John G. Stevens, in the same court, to enforce their supply lien under the state law. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000. The Gladwish libel resulted in a decree condemning the John G. Stevens for the coal supplied, and costs, in all $218.07.

"The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the John G. Stevens, leaving the Loud decree unsatisfied." 58 Fed. Rep. 792.

Upon these facts, the Circuit Court of Appeals desired the instruction of this court upon this question of law: "Is the lien for the damages occasioned by negligent towage, which arose on March 8, 1886, to be preferred to the previous state lien for supplies, the libel for supplies being filed last?"

Mr. Harrington Putnam for appellants.

Mr. Mark Ash and *Mr. J. Parker Kirlin* for appellees. *Mr. J. H. Lichliter* was on *Mr. Ash's* brief.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The question presented by this record is whether a lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.

This question may be conveniently divided, in its consideration by the court, as it was in the arguments at the bar, into

two parts: First. Is a claim in tort for damages by a collision entitled to priority over a claim in contract for previous supplies? Second. Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage, a claim in tort?

In the case of *The Bold Buccleugh*, 7 Moore P. C. 267, decided in 1852 by the Judicial Committee of the Privy Council, upon appeal from the English High Court of Admiralty, and ever since considered a leading case, both in England and in America, it was adjudged that a collision between two ships by the negligence of one of them created a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attached at the time of the collision, and might be enforced in admiralty by proceedings *in rem* against the offending ship, even in the hands of a *bona fide* purchaser; and Chief Justice Jervis, in delivering judgment, said: "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession." "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." And, after observing that this rule could not be better illustrated than by the circumstances of *The Aline*, (1839) 1 W. Rob. 111 — in which Dr. Lushington had expressed the opinion that, in a proceeding *in rem*, the claim for damages must be preferred to a bottomry bond given before the collision; but was not entitled, as against the holder of a like bond given after the collision, to the increased value of the vessel by reason of repairs effected at his cost — Chief Justice Jervis summed up the matter as follows: "The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the colli-

sion, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So, by the collision, the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases." 7 Moore P. C. 284, 285.

The decision in *The Bold Buccleugh* has never been departed from in England, but has been constantly recognized as sound law in the courts exercising admiralty jurisdiction. *The Europa*, Brown. & Lush. 89, 91, 97; *S.C.* 2 Moore P. C. (N. S.) 1, 20; *The Charles Amelia*, L. R. 2 Ad & Ec. 330, 333; *The City of Mecca*, 6 P. D. 106, 113, 119; *The Rio Tinto*, 9 App. Cas. 356, 360; *The Dictator*, (1892) P. D. 304, 320. And in a very recent case in the House of Lords, that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. *Currie* v. *McKnight*, (1897) App. Cas. 97.

It has been generally laid down in the English text books that a maritime lien for damages by a collision takes precedence of all earlier maritime liens founded in contract. Abbott on Shipping, (Shee's ed.) pt. 6, c. 4, § 2; Coote's Admiralty Practice, 118; Maclachlan on Shipping, c. 15; Foard on Shipping, 217; Marsden on Collisions, (3d ed.) 82. And the English and Irish courts have even held that a claim for damages from a collision by the negligence of a foreign ship creates a lien upon the whole value of the ship and freight, without deduction for seamen's wages, because, it has been said, the owner of the ship, being personally liable to the seamen for their wages, should not be permitted to deduct expenses for which he is liable, and thus benefit the wrongdoer at the expense of him to whom the wrong has been done. *The Elin*, 8 P. D. 39, 129, and cases there cited.

That a claim for supplies furnished to a vessel should be

preferred to a claim for damages for a subsequent collision appears never to have been even suggested in England, probably because, by the law of England, material-men, without possession, have no maritime lien for supplies, even to a foreign ship, but a mere right to seize the ship by process in admiralty, in the nature of an attachment. *The Rio Tinto*, 9 App. Cas. 356; *The Henrich Björn*, 10 P. D. 44, and 11 App. Cas. 270. "Claims for necessaries," said Dr. Lushington, "do not possess, *ab origine*, a lien; but carry only a statutory remedy against the *res*, which is essentially different." *The Gustaf*, Lush. 506, 508.

There can be no doubt, therefore, that in the English admiralty courts the lien for damages by collision would take precedence of an earlier claim for supplies.

In this country, the principle, applied in the case of *The Bold Buccleugh* to a claim for damages by collision, that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. *General Ins. Co.* v. *Sherwood*, 14 How. 351, 363; *The Creole*, 2 Wall. Jr. 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How. 82, 89; *The Rock Island Bridge*, 6 Wall. 213, 215; *The China*, 7 Wall. 53, 68; *The Siren*, 7 Wall. 152, 155; *The Lottawanna*, 21 Wall. 558, 579; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20; *The Glide*, 167 U. S. 606.

Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises, not only from a collision and for the damages caused thereby; *General Ins. Co.* v. *Sherwood*, *The Rock Island Bridge*, *The Siren* and *The China*, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. *The Young Mechanic*, *The Kiersage*, *The Lottawanna*, *The J. E. Rumbell* and *The Glide*, above cited.

Some years before the decision in *The Bold Buccleugh*, Mr. Justice Story had clearly recognized the existence of a maritime lien, as well for damages by collision; *The Malek Adhel*, 2 How. 210, 234; as for supplies in a foreign port, regarding which he observed: "A material-man, who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the security for his advances; in which case, he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage. But if he is content with receiving the amount of his advances and common interest, he may rely on that tacit lien or claim, which the maritime law gives him upon the ship itself, in addition to the personal security of the owners. Wherever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by a proceeding *in rem*; and, indeed, it is the only court competent to enforce it." *The Nestor*, 1 Sumner, 73, 78. And it is worthy of note that the last part of this observation was quoted and relied on in the judgment in *The Bold Buccleugh*, 7 Moore P. C. 284.

By our law, then, a claim for damages by collision, and a claim for supplies, are both maritime liens. The question of their comparative rank is now for the first time presented to this court for adjudication; and it has been the subject of conflicting decisions in other courts of the United States, and especially in those held within the State of New York.

In *The America*, (1853) Judge Hall, in the Northern District of New York, appears to have held liens for collisions and those for supplies to be of equal rank, without regard to the date when they attached to the ship. 16 Law Reporter, 264. A claim for damages by collision has been postponed to an earlier claim for supplies, by Judge Brown, in the Southern District of New York, in *The Amos D. Carver*, 35 Fed. Rep. 665; but has been preferred to such a claim, by Judge Benedict, in the Eastern District of New York, and by Mr. Justice Blatchford on appeal, in *The R. S. Carter* & *The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331. And, in an

earlier case, a claim for collision had been allowed by Judge Benedict a like preference over a previous bottomry bond. *The Pride of the Ocean*, 3 Fed. Rep. 162.

The preference due to the lien for damages from collision, over earlier claims founded on contract, has been carried so far as to allow the lien for damages to prevail over the claim of seamen for wages earned before the collision, by Judge Lowell, in the District of Massachusetts, in *The Enterprise*, 1 Lowell, 455; by Judge Nixon, in the District of New Jersey, in *The Maria & Elizabeth*, 12 Fed. Rep. 627; by Judges Gresham and Jenkins, in the Circuit Court of Appeals for the Seventh Circuit, in *The F. H. Stanwood*, 9 U. S. App. 15; and by Judge Swan, in the Eastern District of Michigan, in *The Nettie Woodward*, 50 Fed. Rep. 224. The opposite view has been maintained, in the Southern District of New York, by Judge Choate, in *The Orient*, 10 Benedict, 620, as well as by Judge Brown, in *The Amos D. Carver*, 35 Fed. Rep. 665, above cited; and in the Eastern District of New York, by Judge Benedict, in *The Samuel J. Christian*, 16 Fed. Rep. 796; and in the Western District of Michigan, by Judge Severens, in *The Daisy Day*, 40 Fed. Rep. 538.

The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. *The Madonna D'Idra*, 1 Dodson, 37, 40; *The Sydney Cove*, 2 Dodson, 11, 13; *The Neptune*, 1 Hagg. Adm. 227, 239; *Sheppard* v. *Taylor*, 5 Pet. 675, 710; *Brown* v. *Lull*, 2 Sumner, 443, 452; *Pitman* v. *Hooper*, 3 Sumner, 50, 58; Abbott on Shipping, pt. 4, c. 4, § 8; 3 Kent Com. 197. Yet see *Norwich Co.* v. *Wright*, 13 Wall. 104, 122.

Nor does this case present any question between successive liens for repairs or supplies, the general rule as to which is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated. Abbott on Shipping, pt. 2,

c. 3, § 32; *The St. Jago de Cuba*, 9 Wheat. 409, 416; *The J. E. Rumbell*, 148 U. S. 1, 9; *The Fanny*, 2 Lowell, 508, 510.

Nor does it present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate, in the District Court, giving the preference to the later claim, upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the ordinary marine perils, including the second collision; and Mr. Justice Blatchford, in the Circuit Court, reversing the decree, because the vessel libelled had not been benefited, but had been injured, by the second collision. *The Frank G. Fowler*, 8 Fed. Rep. 331, and 17 Fed. Rep. 653.

Nor yet does it present the question whether a lien for repairs made after the collision, so far as they increase the value of the vessel, may be preferred to the lien for the damages by the collision, in accordance with the English cases of *The Aline* and *The Bold Buccleugh*, cited at the beginning of this opinion.

But the question we have to deal with is whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, § 75, note; Marsden on Collisions, (3d ed.) 93.

The act of Congress of December 22, 1807, c. 5, laid an embargo on all ships and vessels, within the limits and jurisdiction of the United States, bound to any foreign port or place; and the supplemental act of January 9, 1808, § 3, provided that any ship or vessel proceeding, contrary to the provi-

sions of the act, to a foreign port or place, should be forfeited. 2 Stat. 451, 453. Upon the trial of a libel in the Circuit Court of the United States to enforce the forfeiture of a vessel under those acts, Chief Justice Marshall said: "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." *The Little Charles*, 1 Brock. 347, 354.

Upon a libel of information for the condemnation of a piratical vessel, under the act of Congress of March 3, 1819, c. 77, continued in force by the act of May 15, 1820, c. 113, (3 Stat. 510, 600,) Mr. Justice Story, delivering the opinion of this court, and referring to seizures in revenue causes, said: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty." *The Palmyra*, 12 Wheat. 1, 14.

In *The Malek Adhel*, 2 How. 210, 233, 234, Mr. Justice Story, in delivering judgment, stated the principle more fully, saying: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." And, after quoting the passages above cited from the opinions in *The Little Charles* and in *The Palmyra*, he added: "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the

means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

In *The China*, 7 Wall. 53, 68, by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors." "According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

The same principle has been recognized in other cases. *The John Fraser*, 21 How. 184, 194; *The Merrimac*, 14 Wall. 199; *The Clarita & The Clara*, 23 Wall. 1; *Ralli* v. *Troop*, 157 U. S. 386, 402, 403.

That the maritime lien upon a vessel, for damages caused by her fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compen-

sation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh*, before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim." 7 Moore P. C. 285.

We are then brought to the question, whether a claim by a tow against her tug, for damages from coming into collision with a third vessel because of negligent towage, is a claim in tort, standing upon the same ground as a claim of the third vessel for damages against the tug.

Upon this question, again, there have been conflicting opinions in the District Courts of the United States.

On the one hand, it has been held by Judge Benedict, in the Eastern District of New York, in several cases, including the case at bar, that a claim by a tow against her tug for damages caused by the negligence of the latter is founded on a voluntary contract between the owner of the tow and the owner of the tug, and should be postponed to a claim against the tug for necessary supplies or repairs furnished before the contract of towage was made. *The Samuel J. Christian*, 16 Fed. Rep. 796; *The John G. Stevens*, 58 Fed. Rep. 792; *The Glen Iris*, 78 Fed. Rep. 511. The same conclusion has been

reached by Judge Brown, in the Southern District of New York, proceeding upon the hypothesis that the security for the maritime obligation created by the contract of towage is subject to all liens already existing upon the vessel, and upon the theory that, by the general maritime law, liens *ex delicto*, including all liens for damage by collision, are inferior in the rank of privilege to liens *ex contractu*. *The Grapeshot*, 22 Fed. Rep. 123; *The Young America*, 30 Fed. Rep. 789; *The Gratitude*, 42 Fed. Rep. 299.

On the other hand, the claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid, for the towage, by Mr. Justice Blatchford, when District Judge, in *The Brooklyn*, 2 Benedict, 547, and in *The Deer*, 4 Benedict, 352; by Judge Lowell, in *The Arturo*, 6 Fed. Rep. 308; and by Judge Swing, in the Southern District of Ohio, in *The Liberty*, 7 Fed. Rep. 226, 230. In *The Arturo*, Judge Lowell said: "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision." 6 Fed. Rep. 312. And it has accordingly been held, by Judge Nixon, and by Judge Severens, that such a claim by a tow against her tug is entitled to priority of payment over liens on the tug for previous repairs or supplies. *The M. Vandercook*, 24 Fed. Rep. 472, 478; *The Daisy Day*, 40 Fed. Rep. 538.

The decisions of this court are in accordance with the latter view, and are inconsistent with any other.

It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a

duty imposed by the law, independently of contract or of consideration, and is therefore founded in tort. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 485; *Atlantic & Pacific Railroad* v. *Laird*, 164 U. S. 393.

In *Norwich Co.* v. *Wright*, 13 Wall. 104, 122, Mr. Justice Bradley, referring to Maclachlan on Shipping, (1st ed.) 598, laid down these general propositions: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause." Although these propositions went beyond what was required for the decision of that case, which was one of a collision between two vessels, owing to the fault of one of them, causing the loss of her cargo, as well as of the other vessel and her cargo, yet the very point adjudged was that the lien on the offending vessel for the loss of her own cargo was a lien for reparation of damage, and therefore was upon an equality with the lien upon her for the loss of the other vessel and her cargo.

This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*.

In *The Quickstep*, 9 Wall. 665, 670, a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained, because the contract alleged was not proved, was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

Again, in *The Syracuse*, 12 Wall. 167, 171, which was a libel by a tug against her tow for negligently bringing her into collision with a vessel at anchor, the court, speaking by the same justice, said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal boat suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." And see *The J. P. Donaldson*, 167 U. S. 599, 603.

The essential likeness between the ordinary case of a collision between two ships, and the liability of a tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty, (followed in the very proceeding in which the question now before us arose,) which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing. *The Alabama & The Gamecock*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The L. P. Dayton*, 120 U. S. 337; *The R. S. Carter & The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331.

The result of applying to the case at bar the principles of the maritime law of the United States, as heretofore declared by this court, is that the lien for the damages occasioned by negligent towage must be preferred to the previous lien for supplies.

In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the comparative rank of various maritime liens, and because the general maritime law is in force in this country,

or in any other, so far only as administered in its courts, or adopted by its own laws and usages. *The Lottawanna*, 21 Wall. 558, 572; *The Belgenland*, 114 U. S. 355, 369; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 444; *Ralli* v. *Troop*, 157 U. S. 386, 407.

Question certified answered in the affirmative.